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A SELECTION OF CASES
AND OTHER AUTHORITIES UPON
CRIMINAL LAW

BY

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ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY

THIRD EDITION

CAMBRIDGE
HARVARD UNIVERSITY PRESS

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PREFACE

TO THE THIRD EDITION.

A REARRANGEMENT of courses in the Harvard Law School has taken out of the course on Criminal Law and included in a new course the topics of Causation, Justification, and Excuse. The chapters in which these topics were considered have therefore been removed from this book. This third edition is identical with the second, except that the chapters mentioned, viz., Chapters V, VIII, and IX, and part of Chapter III of the old edition, have been removed; but this change has made necessary an entire renumbering of the pages in this edition.

JOSEPH HENRY BEALE.

CAMBRIDGE, January 1, 1915.

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"NOTHING is more common than to hear those who have taken only a superficial view of the Crown Law charge it with numberless hardships and undistinguishing rigor; whereas those who have more fully examined it agree that it wants nothing to make it admired for clemency and equity, as well as justice, but to be understood. It is so agreeable to reason, that even those who suffer by it cannot charge it with injustice; so adapted to the common good as to suffer no folly to go unpunished, which that requires to be restrained; and yet so tender of the infirmities of human nature, as never to refuse an indulgence where the safety of the public will bear it. It gives the Prince no power, but of doing good; and restrains the people from no liberty, but of doing evil." — *Preface to Hawkins' Pleas of the Crown.*

CASES ON CRIMINAL LAW.

CHAPTER I.

INTRODUCTORY.

SECTION I.

Common Law and Statute.

OHIO *v.* LAFFERTY.

COURT OF COMMON PLEAS, OHIO. 1817.

[*Reported Tappan*, 81.]

Lafferty was convicted, on three several indictments, for selling unwholesome provisions.

Wright, for the defendant, moved, in arrest of judgment "for that there is no law of this state against selling unwholesome provisions." He observed, that the indictment was bottomed upon the common law of England, which was not in force in this state, it never having been adopted by our constitution, or recognized by our laws or judicial decisions.

Tappan, President. The question raised on this motion, whether the common law is a rule of decision in this state? is one of very great interest and importance, and one upon which contradictory opinions have been holden both at the bar and upon the bench.

No just government ever did, nor probably ever can, exist without an unwritten or common law. By the common law is meant those maxims, principles, and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and, by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage life to civilization, order, and a government of laws.

For the forms of process, indictment, and trial, we have no statute law directing us; and for almost the whole law of evidence, in criminal as well as in civil proceedings, we must look to the common law, for we have no other guide. Can it be said, then, that the common law is not in force when, without its aid and sanction, justice cannot be administered; when even the written laws cannot be construed, explained, and enforced without the common law, which furnishes the rules and principles of such construction?

We may go further, and say that not only is the common law necessarily in force here, but that its authority is superior to that of the written laws; for it not only furnishes the rules and principles by which the statute laws are construed, but it ascertains and determines the validity and authority of them. It is, therefore, that Lord Hobart said that a statute law against reason, as to make a man a judge in his own cause, was void.

As the laws of nature and reason are necessarily in force in every community of civilized men (because nature is the common parent, and reason the common guardian of man), so with communities as with individuals, the right of self-preservation is a right paramount to the institution of written law; and hence the maxim, *the safety of the people is the supreme law*, needs not the sanction of a constitution or statute to give it validity and force. But it cannot have validity and force, as law, unless the judicial tribunals have power to punish all such actions as directly tend to jeopardize that safety; unless, indeed, the judicial tribunals are the guardians of public morals, and the conservators of the public peace and order. Whatever acts, then, are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only *may*, but *must*, be repressed and punished, or government and social order cannot be preserved. It is this salutary principle of the common law which spreads its shield over society to protect it from the incessant activity and novel inventions of the profligate and unprincipled, — inventions which the most perfect legislation could not always foresee and guard against.

But although the common law in all countries has its foundation in reason and the laws of nature, and therefore is similar in its general principles, yet in its application it has been modified and adapted to various forms of government; as the different orders of architecture, having their foundation in utility and graceful proportion, rise in various forms of symmetry and beauty, in accordance with the taste and judgment of the builder. It is also a law of liberty; and hence we find that when North America was colonized by emigrants who fled from the pressure of monarchy and priestcraft in the old world to enjoy freedom in the new, they brought with them the common law of England (their mother country), claiming it as their birthright and inheritance. In their charters from the crown they were careful to have it recognized as the foundation on which they were to erect their laws and governments; not more anxious was Æneas to secure from the burning ruins of Troy his household gods, than were these first settlers of America to secure to themselves and their children the benefits of the common law of England. From thence, through every stage of the colonial governments, the common law was in force so far as it was found necessary or useful. When the revolution commenced, and independent state governments were formed; in the midst of hostile collisions with the mother country, when the passions of men were inflamed, and a deep and general abhorrence of the tyranny of the British government was felt, the sages and patriots who commenced that revolution, and founded those state governments, recognized in the common law a guardian of liberty and social order. The common law of England has thus always been the common law of the colonies and states of North America; not, indeed, in its full extent, supporting a monarchy, aristocracy, and hierarchy, but so far as it was applicable to our more free and happy habits of government.

Has society been formed and government instituted in Ohio on different principles from the other states in this respect? The answer to this question will be found in our written laws.

The ordinance passed by the congress of the United States on the 13th of July, 1787, "for the government of the territory of the United States North West of the river Ohio," is the earliest of our written laws. Possessing the Northwestern Territory in absolute sovereignty, the United States, by that instrument, provide for the temporary government of the people who may settle there; and, to use the language of that instrument, "for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states and permanent government therein; and for their admission to a share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest," it was ordained and declared, "that the inhabitants of the said territory shall *always* be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, *and of judicial proceedings according to the course of the common law*," — as one of the articles of compact between the original states, and the people and states in the said territory, to remain forever unalterable unless by common consent. Under this ordinance we purchased lands and made settlements in this then Northwestern Territory; we became voluntary parties to this contract, and made it, by our own act, what it was intended to be, "the basis of all our laws, constitutions and government" — and thus the common law became here, as it had become in the earliest colonies, the foundation of our whole system of jurisprudence.

That these articles of compact were of perpetual obligation upon the people and states to be formed in the territory, unless altered by the mutual consent of such states and of the original states, is a position which I have never heard controverted; yet it may not be useless to advert to express recognitions of it by both the contracting parties. First, the United States, by the act of congress entitled "an act to enable the people of the eastern division of the territory North West of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes," under the authority of which Ohio became an independent state, authorized the people of said division to form a constitution and state government, "provided the same shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the original states and the people and states of the territory North West of the river Ohio." Section 5th. Second, the people of Ohio, by the preamble to their state constitution, declare, that they ordain and establish that constitution, "consistent with the constitution of the United States, the ordinance of congress of 1787, and the law of congress."

The common law being a part of the existing system of jurisprudence at the time when the state government was formed, and its continuance being expressly provided for by the 4th section of the last article or schedule to this constitution, which declares that "all laws and parts of laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature." We will next examine the power of this court to enforce it.

The 1st section of the 3d article of the constitution declares that "the judicial power of the state, both as to matters of law and equity, shall be vested in a supreme court, in courts of common pleas for each county," etc. The 2d section declares that the supreme court "shall have original and appellate jurisdiction, both in common law and chancery, in such cases as shall be directed by law;" and the 3d section, that "the court of common pleas shall have common law and chancery jurisdiction in all such cases as shall be directed by law." These sections refer to future legislative provision to mark the boundaries of jurisdiction between the court of common pleas and the supreme court, and to fix their extent; but they do not refer to such provision to point out the particular wrongs which may be redressed by petition in equity, by private suit, or by criminal prosecution. Such has been the uniform construction of these sections by the legislature since the constitution was formed, as must be evident from the fact that no statute law has ever been made or projected to detail those wrongs, private or public, which the judicial tribunals were to redress by virtue of their chancery powers, or "according to the course of the common law." Such a statute would indeed be a phenomenon, the result of a more perfect legislation than man has yet attained to.

But it has been urged that the 4th section of the 3d article is the only part of the constitution which gives this court jurisdiction in criminal cases, and that it expressly refers to future statutory provision, to point out the *cases* in which such jurisdiction may be exercised. The language of this section is: "The judges of the supreme court and courts of common pleas shall have complete criminal jurisdiction in such cases, and in such manner as may be pointed out by law."

The laws in existence at the time when the constitution was formed, November 29, 1802, and the state government commenced (beside those of the United States), were the common law, the statutes of other states adopted by the governor and judges of the territory, and the acts of the territorial legislatures, — all which were continued in force by the constitution. This section of the constitution, by giving jurisdiction in matters of crime, "*in such cases and in such manner as may be pointed out by law*," must mean, in such cases and in such manner as may be now or hereafter pointed out by law; for it must either intend to give the court jurisdiction according to the then existing laws, or to require of the legislature an immediate and perfect criminal code, and so operate as a repeal of the former. It could not intend the latter, because neither a convention or legislature can ever be construed to have exceeded their power, unless such intent is clearly and positively expressed; and so far is such intent from being expressed, by the section referred to, that the utmost latitude of construction leaves the intent that way ambiguous. It must intend the former: 1. Because the convention who framed the constitution were limited in their powers by the ordinance and law of congress; they had not power to deprive the people of Ohio of the benefit of judicial proceedings according to the course of the common law. 2. Because the convention intended the constitution to be consistent with the ordinance and law. 3. Because the constitution expressly continues in force all existing laws.

Such seems ever to have been the opinion of the legislature of this state; for the first general assembly which sat under the constitution passed an act to fix the extent of jurisdiction in the courts, and gave to the common pleas "cognizance of all crimes, offences, and misdemeanors, the punishment whereof is not capital." Stat. Laws, vol. i, 40. But neither the first or second general assembly deemed it necessary to make any material alteration in the criminal code they had received from the territorial government; nor had the state any other criminal laws until the first of August, 1805. And when the state courts superseded the territorial, they were required, "agreeable to their respective jurisdictions," to "take cognizance of all judgments, causes, and matters whatsoever, whether civil or criminal, that are now pending, undetermined or unsatisfied," in the territorial courts; and they were "authorized and required to hear and decide upon the said matters." Stat. Laws, vol. i, 50. In prosecutions at common law, then depending in the territorial courts, the state courts were thus directed to take cognizance, to hear and decide upon them, "according to the course of the common law."

But suppose that the position is a correct one, that the principles of the common law have no force or authority in this state, and what are the consequences? They are these: that there are no legal forms of process, of indictments, or trial; there is no law of evidence, and the statute laws cannot be enforced, but must remain inoperative from the uncertain signification of the terms used in defining criminal offences. Beside, the constitution gives jurisdiction to this court in criminal matters, "in such cases and in *such manner as may be pointed out by law;*" and as we have no statute pointing out the manner in which such jurisdiction shall be exercised, the consequence follows that it cannot be lawfully exercised in any manner whatever.

On the whole, therefore, it may be concluded that, were the written laws wholly silent on the subject, the principles and maxims of the common law must, of necessity, be the rule and guide of judicial decision in criminal as well as in civil cases; to supply the defects of a necessarily imperfect legislation, and to prevent "the will of the judge, that law of tyrants," being substituted in the room of known and settled rules of law in the administration of justice.

And that by the ordinance of congress, the constitution and laws of the state, a common-law jurisdiction in criminal cases is established and vested in this court. The motion in arrest is, therefore, overruled.

The defendant was fined fifty dollars in each case, with costs.

MITCHELL *v.* STATE.

Supreme Court of Ohio. 1884.

[*Reported* 42 *Ohio State*, 383.]

Okey, J.[1] The following positions are shown by the authorities to be impregnable.

1. In Ohio, as under the federal government (U. S. *v.* Hudson, 7 Cr. 32; U. S. *v.* Coolidge, 1 Wheat. 415; U. S. *v.* Britton, 108 U. S. 197) we have no common-law offences. No act, however atrocious, can be punished criminally, except in pursuance of a statute or ordinance lawfully enacted. This proposition was not established without prolonged discussion. In Ohio *v.* Lafferty, Tappan, 81 (1817), it was held in an able opinion by Judge Tappan, that common-law crimes are punishable in Ohio; but Judge Goodenow, a member of this court under the former constitution, in his work entitled "Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common Law, on the Subject of Crimes and Punishments," (1819), completely refuted the soundness of

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[1] Only so much of the case as discusses the province of the common law in Ohio is given.

that view, and it is now perfectly well settled that Ohio *v.* Lafferty is not law. Key *v.* Vattier, 1 Ohio, 132, 144; Winn *v.* State, 10 Ohio, 345; Vanvalkenburgh *v.* State, 11 Ohio, 404; Allen *v.* State, 10 Ohio St. 287, 301; Smith *v.* State, 12 Ohio St. 466, 469; Knapp *v.* Thomas, 39 Ohio St. 377, 385.

2. In order that this statement may not mislead, it is proper to say, that while the rule is well settled that a statute defining a crime and prescribing punishment therefore must be strictly construed (Denbow *v.* State, 18 Ohio, 11; Hall *v.* State, 20 Ohio, 1; Shultz *v.* Cambridge, 38 Ohio St. 659); still, where the legislature, in defining a crime, adopts the language employed by writers of recognized authority in defining the crime at common law, the presumption is that it was intended the commission of acts which at common law would constitute such crime, should constitute a crime under the statute, and the statute will be so construed. Accordingly it was held in Ducher *v.* State, 18 Ohio, 308, that where the defendant obtained entrance into a house by fraud, with intent to steal, he entered "forcibly;" and, on the same principle, it was held in Turner *v.* State, 1 Ohio St. 422, that where, by putting a person in fear, money is taken, not from his person, but from his presence, the money being under his immediate control, the crime of robbery is shown, within the meaning of the statute which punishes taking money "from the person of another." [1]

UNITED STATES *v.* SMITH.

CIRCUIT COURT OF THE UNITED STATES. 1792.

[*Report* 6 *Dane's Abridgment*, 718].

FOUR indictments at common law against the defendants for counterfeiting bank bills of the Bank of the United States, passing them, and having tools to counterfeit, etc. Smith was found guilty of passing bank bills of the said bank, counterfeited.

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[1] See to the same effect, Hartford *v.* State, 96 Ind. 461; Estes *v.* Carter, 10 Ia. 400; Pitcher *v.* People, 16 Mich. 142; Ex parte Meyers, 44 Mo. 279; State *v.* De Wolfe, 67 Neb. 321; State *v.* Gaunt, 13 Or. 115. In a few states the crime must not only be made punishable but must also be defined by statute: Williams *v.* State, 18 Ga. 356; State *v.* Young, 55 Kan. 349.

The criminal law of England was adopted by statute in Texas. Chandler *v.* State 2 Tex. 305. But it is now provided that no act shall be a crime unless it is so provided by statute. Ex parte Bergen, 14 Tex. App. 52.

In Louisiana the common law has also been adopted by statute; but the legislature must declare and define all crimes. State *v.* Gaster, 48 La. Ann. 636. — ED.

Parsons moved in arrest of judgment, because there was no federal statute on the subject; hence only an offence at common law; and the state courts exclusively have jurisdiction of these offences.

THE COURT held, the act incorporating the bank of the United States was a constitutional act, and that by the Constitution of the United States the federal courts had jurisdiction of all causes or cases in law and equity, arising under the said constitution and laws of the United States; that this was a case arising under those laws, for those bills were made in virtue thereof, though there was no statute describing or punishing the offence of counterfeiting them; and therefore to counterfeit them was a contempt of and misdemeanor against the United States, and punishable by them as such.

UNITED STATES *v.* HUDSON.

SUPREME COURT OF THE UNITED STATES. 1812.

[*Reported* 7 *Cranch*, 32.]

THIS was a case certified from the Circuit Court for the District of Connecticut, in which, upon argument of a general demurrer to an *indictment* for a libel on the President and Congress of the United States, contained in the "Connecticut Currant" of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel.

Pinkney, Attorney-General, in behalf of the United States, and *Dana*, for the defendants, declined arguing the case.

The Court having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States, — whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions, — that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present. It is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

And such is the opinion of the majority of this court; for the power which Congress possess to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended, in its nature very indefinite, applicable to a great variety of subjects, varying in every State in the Union, and with regard to which there exists no definite criterion of distribution between the district and Circuit Courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that upon the formation of any political body an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. But without examining how far this consideration is applicable to the peculiar character of our Constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval probably with the first formation of a limited government, belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution; but jurisdiction of crimes against the State is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases we are of opinion is not within their implied powers.[1]

BARKER *v.* PEOPLE.

COURT OF ERRORS, NEW YORK. 1824.

[*Reported* 3 *Cowen*, 686.]

ERROR to the Supreme Court. In February, 1822, Jacob Barker, the plaintiff in error, was indicted in the Court of General Sessions of the Peace, of the city and county of New York, for sending a challenge to David Rogers to fight a duel. The indictment contained five counts; the first four of which alleged the offence to have been committed by Barker in the city of New York, on various days, in the months of January and February, 1822, "against the form of the statute in such case made and provided," being founded on the act "to suppress duelling," passed the 5th of November, 1816. The fifth count was for a similar offence at common law. The plaintiff in error was tried on the indictment, at the Court of General Sessions, held in the city of New York, in May, 1822. The jury rendered a general verdict of guilty, and the District Attorney having entered a *nolle prosequi* on the fifth count (for the offence at common law), the Court, thereupon, gave judgment that the plaintiff in error, "for the offence aforesaid, as charged in the first, second, third, and fourth counts of the said indictment, whereof he is convicted, be incapable of holding, or being elected to any post of profit, trust, or emolument, civil or military, under the State of New York."

A writ of error was brought, on this judgment, to the Supreme Court, which, in January term, 1823, *affirmed* the judgment of the General

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[1] The common law defines the terms and prevails in all questions except jurisdiction to punish for crimes, U. S. *v.* Carll. 105 U. S. 611.

The common law as to crime prevails in the District of Columbia. Tyner *v.* U. S., 23 App. D. C. 324. — ED.

Sessions. (*Vide* 20 John. Rep. 457 S. C., which contains the reasons assigned to this Court in support of the judgment.) [1]

Sanford, Chancellor. The first section of the act of the fifth of November 1816, to suppress duelling, prescribes, that "the person convicted shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under this state:" and the objection now made is, that this punishment is inconsistent with the constitution.

The constitution of the United States provides that cruel and unusual punishments shall not be inflicted. The power of the legislature in the punishment of crimes is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of "the legislative power of this state," mentioned in the first sentence of the constitution. It is the sovereign power of a state to maintain social order by laws for the due punishment of crimes. It is a power to take life, and liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, and safety of the community. This general authority is vested in the legislature, and it is one of the most ample of their powers, its due exercise is among the highest of their duties. When an offender is imprisoned, he is deprived of the exercise of most of the rights of a citizen; and when he suffers death, all his rights are extinguished. The legislature have power to prescribe imprisonment or death as the punishment of any offence. The rights of a citizen are thus subject to the power of the state in the punishment of crimes; and the restrictions of the constitution upon this, as upon all the general powers of the government, are, that no citizen shall be deprived of his rights, unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty, or property, without due process of law.

The constitution has, in one case, limited punishment. When an officer of the state is convicted upon impeachment, the judgment cannot extend farther than removal from office and disqualification to hold office. This provision stands here a restriction, not an authority. As the punishment is not to extend farther than removal and disqualification, the sense of the terms, and the known course of proceedings in the country from which we derive the history and practice of impeachments, both show that this provision is a mere limitation of a greater power, a power to inflict other punishments, as well as removal and disqualification. Impeachments of public officers, a peculiar species of accusation madé and tried in a peculiar manner, are to extend no farther in their effect than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause for which the officer is thus punished is a public offence, he may be also indicted, tried, and punished according to law; the constitution leaving the definition of the offence and its particular punishment in this case, as in all the others, to the general power of the legislature. This part of the constitution concerning judgment on impeachments is therefore a limitation of the power of the court for the trial of impeachments, and not a restriction upon the general power of the legislature over crimes.

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[1] Arguments of counsel and parts of the opinion of the court are omitted.—Ed.

The power of the state over crimes is thus committed to the legislature without a definition of any crime, without a description of any punishment to be adopted or to be rejected, and without any direction to the legislature concerning punishments. It is, then, a power to produce the end by adequate means; a power to establish a criminal code, with competent sanctions; a power to define crimes and prescribe punishments by laws in the discretion of the legislature.

But though no crime is defined in the constitution, and no species of punishment is specially forbidden to the legislature, yet there are numerous regulations of the constitution which must operate as restrictions upon this general power. The whole constitution must be supported, and all its powers and rules must be reconciled into concord. A law which should declare it a crime to exercise any fundamental right of the constitution, as the right of suffrage, or the free exercise of religious worship, would infringe an express rule of the system, and would therefore not be within the general power over crimes. Particular punishments would also encroach upon rules and rights established by the constitution. Though the legislature have an undoubted power to prescribe capital punishment and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights would, even as a punishment, be, in many cases, repugnant to rules and rights expressly established. Many rights are plainly expressed, and intended to be fundamental and inviolable in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right could not be allowed in the form of a punishment. Any other right thus secured, as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all; to criminals as well as to others; and a punishment consisting solely in the deprivation of such a right would be an evident infringement of the constitution. Any punishment operating as an infringement of some rule thus expressly established, or some right thus expressly secured, would be unconstitutional; and all punishments which do not subvert such rules and rights of the constitution are within the scope and choice of the legislative power.

But while many rights are consecrated as universal and inviolable, the right of elegibility to office is not so secured. It is not one of the express rules of the constitution, and is not declared as a right, or mentioned in terms as a principle, in any part of the instrument. Important as this right is, it stands, as the right to life itself stands, subject to the general power of the legislature over crimes and punishments.

It has been strongly urged that the power to prescribe this species of punishment may be abused. That such a power may be abused cannot be denied, since all power entrusted to men is subject to abuse. The power to declare crimes and prescribe punishments is high, indefinite, and discretionary, and therefore affords ample room for abuse. Yet the legislature by their acts, instead of any tendency to severity, show a strong disposition to mildness in the use of their power over crimes and punishments. That disqualification to hold public trusts will become a frequent punishment seems not probable ; the legislature having hitherto adopted this punishment only in the two cases of bribery and duels. But whatever may be the danger of abuse, the punishment itself is not unconstitutional. The remedy for abuse of the legislative power, in enacting laws which may be unwise, while they are not unconstitutional, is not in the courts of justice. It is found in other parts of the system, in frequent elections and in the due course of the legislative power itself, which alike enacts and repeals laws in pursuance of public opinion. That this punishment is little consonant to the genius of our institutions ; that there is an ample choice of punishments for crimes without adopting this ; that the electors and the appointing powers should enjoy their free choice for public stations, without legal exclusions even for crimes, are reasons of great force; but they are reasons upon which the legislature must decide.

My opinion upon the whole case is, that the punishment of incapacity to hold office, prescribed by the act to suppress duelling, is not inconsistent with the constitution; and that this cause has been rightly determined by the courts through which it has passed.

BOWMAN, BURT, CLARK, DUDLEY, EARLL, GARDINER, HEIGHT, LYNDE, MALLORY, M'CALL, M'INTYRE, REDFIELD, SUDAM, THORN, WARD, WOOSTER, and WRIGHT, Senators, concurred.

OGDEN, Senator, dissented.

LEDGERWOOD *v.* STATE.

SUPREME COURT OF INDIANA. 1893.

[*Reported* 134 *Ind.* 81].

McCABE, J. — The appellant was convicted by the Circuit Court on a plea of guilty on an indictment charging him and Samuel Harbin with arson, and each was sentenced to the State's prison for the period of seventeen years, and the court fined each of them one hundred dollars, and rendered judgment accordingly. The appellant alone appeals.

The errors assigned are :

1 and 2. That the indictment does not state facts sufficient to constitute a public offence.

3. That the court had no jurisdiction of the subject.

4. That the court had no jurisdiction over the person of appellant.

5. That there was error in overruling appellant's motion to be discharged.

6. That there was error in permitting the state to file counter-motions and affidavits to appellant's motion for discharge.

7. That there was error in overruling the motion to strike out parts of said counter-affidavits.

8. That there was error in overruling appellant's motion in arrest of judgment.

9. That there was error in overruling appellant's motion for a new trial.

There were two counts in the indictment. Therefore, if either count was sufficient, there was no error in overruling the motion in arrest ot judgment. Bryant *v.* State, 106 Ind. 549.

The first count reads as follows, omitting the formal part: "That Bazil Ledgerwood and Samuel Harbin, on the 7th day of October, 1891, at and in the county of Daviess, in the State of Indiana, did then and there unlawfully, wilfully, maliciously, and feloniously set on fire and attempt to burn down and destroy the county court-house, situate in the city of Washington, in Daviess county, in the State of Indiana, which county court-house was then and there the property of Daviess county, and then and there of the value of fifty thousand dollars."

We think this count is sufficient in its statement of the facts constituting the offence defined by section 1927, R. S. 1881, as amended by the act approved March 9th, 1891, to withstand a motion in arrest. Acts 1891, p. 402.

It is insisted by appellant's counsel that the latter act is invalid, because it does not define the crime of arson, and in support of that contention they cite the statute which provides that "Crimes and misdemeanors shall be defined and punishment therefor fixed by statutes of this State, and not otherwise." Section 237, R. S. 1881.

This statute was enacted in 1852 as the second section of an act entitled "An act declaring the law governing this State" approved May 31st, 1852. Section 605, 1 R. S. 1876. All that part of the act relating to what laws were in force, and especially that part adopting the English common law, with certain exceptions, had substantially been in force in this state before. Indeed, the English common law, with the exceptions mentioned, had been adopted in this state as far back as the year 1795 by the Governor and judges of the then Territory, and that provision was substantially reënacted by the Territorial Legislature in 1807, and has been substantially reënacted at every revision of our statute since that time. Stevenson *v.* Clond, 5 Blackf. 92. But in the act of 1852, above referred to, the provision as to the definition of crimes and misdemeanors was added for the first time, it being the first provision of the kind ever adopted in this state.

In support of their construction of the statute above cited, appellant's counsel cite Rosenbaum *v.* State, 4 Ind. 599; Smoot *v.* State, 18 Ind. 18; State *v.* President, etc., Ohio, etc., R. R. Co., 23 Ind. 362; State *v.* Johnson, 69 Ind. 85; Stephens *v.* State, 107 Ind. 185.

We have examined these cases, and find them not at all in point, for reasons so obvious that further comment on them is unnecessary.

The appellant's attorneys further seek to support their contention by citing Hackney *v.* State, 8 Ind. 494; Jennings *v.* State, 16 Ind. 335; and Marvin *v.* State, 19 Ind. 181. It must be conceded that these cases all directly support appellant's contention, and hold that a statute that does not define a public offence with some degree of minuteness is void because not in conformity to the first statute above quoted. But these cases, and others like them, were all overruled by this court in Wall *v.* State, 23 Ind. 150. That case has been followed by an unbroken line of decisions by this court until the present time. But the ground upon which FRAZER, Judge, speaking for the whole court, placed the decision in that case, has given rise to some confusion as to the real condition of our criminal code. That able jurist in that case said "That the Legislature can not in such a matter impose limits or restrictions upon its own future action, and that when two statutes are inconsistent, the last enactment stands as the law, are very plain propositions, which we presume will never be controverted. It follows that the act of May 31st, if in conflict with the act of June 10th (which was the date of the enactment of the criminal code of 1852), is so far repealed by the latter act. To hold that the legislature may, by mere exercise of legislative power, say what a future legislature may or may not do, would be but to declare that the whole legislative power of the government may be lawfully annihilated, and the government summarily brought to an end by the action of one of its departments."

While the principle thus announced was correct in the abstract, yet it was not applicable to the case, and did not furnish the true and real reason that made the conclusion reached in the case sound and good law. The court went on to hold, that inasmuch as the statute above quoted was enacted before the criminal statute then in question was enacted, which it was complained did not define the crime sufficiently; that the last act, the criminal statute, in so far as it conflicted with the first, operated as a repeal of the statute above quoted.

As before stated, this decision has been followed by a large number of cases in which the same reason is given for the ruling, and, finally, in Hood *v.* State, 56 Ind. 263, and Ardery *v.* State, 56 Ind. 328, it was held that the section of the statute above quoted was repealed by the act creating crimes and misdemeanors. And though that section has not since been reënacted by the legislature, and the decisions of this court in Hood *v.* State, *supra*, and Ardery *v.* State, *supra*, have not been overruled, this court has, in Jones *v.* State, 59 Ind. 229, and Stephens *v.* State, 107 Ind. 185, said of this section, that "That provision of law still continues in force." Other cases, perhaps, make the same declaration. How such a conclusion is reached neither of the learned judges, HOWK and NIBLACK, delivering the opinions, respectively, in those cases, tells us. The truth is, the long line of cases culminating in the two cases in 56 Ind., *supra*, not being overruled, and the statute therein held to be repealed, never having been reënacted, it is difficult to see how it still remained in force.

In the case in 107 Ind., *supra*, NIBLACK, J., cites in support of the opinion Hackney *v.* State, *supra*, which, as we have seen, had long before been overruled, and, as we now hold, correctly overruled. The inevitable result is, if the statute mentioned has been repealed, as this court held in the cases in 56 Ind., *supra*, it makes a great difference in our criminal law. With that statute repealed, instead of public offences being, as is generally supposed, of statutory creation exclusively, we have all common-law offences as well as those of statutory origin as parts of our criminal law.

Such a result as that, it is well understood, is very undesirable with the courts, the legal profession, and the people. This undesirable result has been brought about by assigning a wrong reason for a right decision, in Wall *v.* State, *supra*, and following that reason to its legitimate result in the subsequent cases. The section of the statute in question was never intended, by the legislature that enacted it, to place a restriction upon the action of future legislatures, or even upon itself, as to the manner of defining crimes and misdemeanors. This is apparent when we take into consideration the history of the whole act in which this provision is found and the evils sought to be remedied by the provision.

As we have already seen, that part of the act adopting the English common law, which was enacted by the Governor and judges of the Indiana Territory in 1795, and reënacted in all the revisions of our statutes substantially as it now is, until 1852, and then for the first time the provision in question was added to that act. Prior to that time the common law as to crimes and misdemeanors was in force because it was so enacted by adopting the common law by the legislative authority of the state without exeception of limitation as to crimes and misdemeanors. State *v.* Bertheol, 6 Blackf. 474.

It was undoubtedly the intention of the legislature in 1852, by adding the provision under consideration to the act adopting the common law, to adopt a new and different system of criminal law from that which had formerly prevailed; it was the intention to modify the act adopting the common law so as not to adopt that part of it relating to crimes and midemeanors. It was the evil of the common law as to criminal offences which were so great in number, and sometimes very shadowy and unsubstantial, imposing upon the people and the courts the necessity of wading through volumes of abstruse learning to ascertain what acts were criminal that the legislature proposed to rid the people of. That could be, and was, accomplished by not adopting the common law as to crimes and misdemeanors. It was desirable and necessary to the public weal to adopt the common law as to other subjects. Therefore, the intention as to public offences was made manifest and effectual by adding the provision to the act adopting the common law that "crimes and misdemeanors shall be defined, and punishment therefor fixed, by statutes of this state and not otherwise."

It was not for the purpose of securing a more minute definition of crimes and misdemeanors than the common law afforded, that this provision was added, but it was to get rid of common-law offences entirely by not adopting that part of the common law. If the common law had not been adopted at all, in whole or in part, the provision in question would have had no significance or force whatever. Because, if no part of the common law had been adopted, the provision in question would have been the law without being enacted. If there was no common law of any kind in force, crimes and misdemeanors must, of necessity, be defined and punishment therefor fixed by statutes of this state and not otherwise. Therefore, this provision was only made necessary to secure a purely statutory criminal code because of the adoption of the common law. This view of the provision relieves it from the charge that it sought to trammel future legislatures, requiring of them any degree of minuteness in defining crimes; indeed, no act subsequent to that, however vague and general in its definition of public offences, is at all inconsistent with that act; on the contrary, all such acts are in harmony with it. It has been held, and we think properly under that statute, that the crime may be designated by the statute without any definition, and the punishment fixed, and the courts would define the crime by the aid of common-law definitions, and the general import of the language employed. Hedderich *v.* State, 101 Ind. 564; State *v.* Berdetta, 73 Ind. 185.

We think, therefore, it was error to hold that the enactment of criminal statutes without specifically defining the crimes designated therein repealed the provision in question or even modified it. And while a proper conclusion was reached in each of the two cases in 56 Ind., *supra*, and the cases leading up to them, yet they were placed on wrong grounds, and so far as they hold that the provision in question had been repealed or modified, they are overruled, and we adjudge that said provision is still in force, unrepealed and unmodified. And, therefore, that we have no common-law offences in Indiana, and that the statute under which this prosecution is waged, which reads as follows: "whoever wilfully and maliciously burns or attempts to burn any dwelling-house or other building, finished or unfinished, occupied or unoccupied, whether the building be used or intended for a dwelling-house or any other purpose;" . . . "the property so burned or attempted to be burned, being of the value of twenty dollars or upwards, and being the property of another, . . . is guilty of arson, and upon the conviction thereof shall be imprisoned in the state prison not more than twenty-one years, nor less than one year, and fined not exceeding double the value of the property burned, . . ." is not invalid for indefiniteness.

COMMONWEALTH *v.* MARSHALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1831.

[*Reported* 11 *Pick.* 350.]

AT April term 1831 of this Court, in the county of Franklin, the defendants were indicted for a misdemeanor in disinterring a dead body on the 20th of February of the same year, *contra formam statuti.* The defendants pleaded *nolo contendere,* and afterwards moved in arrest of judgment, for the following reasons: 1. Because the offence charged in the indictment is therein stated to have been committed in violation of the statute passed March 2, 1815 (St. 1814, c. 175), which was repealed by the statute of Feb. 28, 1831 (St. 1830, c. 57), without any saving or excepting clause whatever; and, 2. Because no offence now known by the laws of this commonwealth, is therein described.

SHAW, C. J., delivered the opinion of the Court. This indictment cannot be maintained, consistently with the decision of the Court last year, in the case in this county, of Commonwealth *v.* Cooley, 10 Pick. 37. In that case it was held, that the statute of 1814, containing a series of provisions in relation to the whole subject-matter of the disinterment of dead bodies, had superseded and by necessary implication repealed the provisions of the common law on the same subject. If it be true, as contended, that as a general rule the repeal of a repealing law, revives the pre-existing law, it would be difficult to maintain that such a clause of repeal, in a statute containing a series of provisions, revising the whole subject, and superseding the existing statute, would revive the pre-existing provisions of the common law. But were that point conceded, as contended for, it would not aid this indictment.

In the case supposed, the common law would not be in force during the existence of the statute, and if revived by its repeal, such revival would take effect only from the time of such repeal.

It is clear, that there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate, by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed.

These principles settle the present case. By the statute 1830, c. 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offence was done after the passing of the statute of 1814, and before that of 1830. The act cannot be punished as an offence at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment therefore can be rendered against the defendants, on this indictment.

Judgment arrested.

HALFIN *v.* STATE.

COURT OF APPEALS OF TEXAS. 1878.

[*Reported* 5 *Tex. App.* 212.]

WINKLER, J. The appellant is prosecuted by information in the County Court, and was convicted on a charge of having violated the provisions of the act of the legislature of 1876, entitled "An act to prohibit the sale, exchange, or gift of intoxicating liquors in any county, justice's precinct, city, or town in this state that may so elect;" prescribing the mode of election, and affixing a punishment for its violation, — commonly known as the local-option law. Acts 1876, p. 26.

It is not disputed that, prior to the alleged commission of the offence charged against the appellant, Caldwell County had, by vote in accordance with the provisions of the act, declared that liquors should not be sold in the county except as authorized by the act aforesaid. But it is insisted on in behalf of the appellant that, since this prosecution was commenced, another election has been held in the county under the provisions of the act in question, by which it was determined that the act should no longer be enforced so as to prohibit the sale of liquors in the county; and that the effect of this last election is to relieve from prosecution and punishment those who had, prior thereto, been accused of violating its provisions.

It is provided, in the third section of the act, for the holding of a special session of the Commissioners' Court, for the purpose of opening the polls and counting the votes, and directing that "if a majority of the votes cast are for prohibition, said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed bounds (except for the purposes specified in section 1 of this act) until such time as the qualified voters therein may, at a legal election held for the purpose, by a majority vote decide otherwise." The section goes on to prescribe the manner of making publication of the result and the order of prohibition.

We are of opinion that the words in the third section, "until such time as the qualified voters therein may, at a legal election held for the purpose, by a majority vote decide otherwise," must be construed as an authority giving the voters interested an opportunity to decide — after the expiration of twelve months, mentioned in the fourth section — by vote whether the prohibition named in the first section shall be longer continued or not, and that a majority vote at this second election would annul, from the time it is held and the result declared and published, the prohibition provided for in the first section of the act.

It being made to appear that the second election contemplated in the act has been held, and that it has resulted in a majority vote against prohibition, we are of opinion that there is no law now in force in Caldwell County by which persons who may be charged under the act can lawfully be punished.

"The repeal of a penal law, when the repealing statute substitutes no other penalty, will be held to exempt from punishment all persons who have offended against the provisions of said repealed law, unless it be declared otherwise in the repealing statute." Penal Code, art. 15 (Posc. Dig., arts. 16, 17); Montgomery *v.* The State, 2 Texas, Ct. App. 618.

There being no law now in force in Caldwell County to punish offenders against the local-option law, since its annulment by the second vote of the county against prohibition, the judgment will be reversed and this prosecution will be dismissed. *Reversed and dismissed.*

STEVENS *v.* DIMOND.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE. 1833.

[*Reported* 6 *N. H.* 330.]

THIS was a writ of error brought to reverse a judgment of the court of common pleas in this county.

It appeared by the record, that Stevens brought an action of debt against Dimond upon the statute of June 17, 1811, entitled "an act to authorize towns to make by-laws to prevent horses, etc., from going at large," and upon a by-law made by the town of Hawke, on the 9th March, 1830, "that if any horse, horse kind, etc., shall be found going at large from and after the first day of April until the last day of October, in any street, highway, or common in said town, the owner thereof shall, for each and every offence forfeit and pay the sum of four dollars, with costs of suit, to any person who may sue for the same, to be recovered in an action of debt, etc., unless such horse, etc., shall be going at large without the knowledge or negligence of the owner or owners."

It was alleged in the declaration that Dimond, on the 11th May, 1830, at Hawke, let one mare and one colt, he being the owner thereof, go at large in a certain highway in said Hawke, with his own knowledge and consent, contrary to the form and effect of the law aforesaid.

The defendant pleaded that he did not owe in manner and form as alleged, and the cause was tried in the common pleas, at October term, 1831, when the plaintiff proved the making of the by-law, and that the mare and colt of the defendant were, on the 11 May, 1830, at large, with his consent, in a highway in Hawke; but the court directed the jury that the said by-law being in force for a year only, from the time of making thereof, and having expired by its own limitation, the plaintiff could not sustain his action. The jury having returned a verdict for the defendant, a bill of exceptions to the directions of the court to the jury was filed and allowed, and this writ of error brought.

RICHARDSON, C. J., delivered the opinion of the court.

The action, the judgment in which is now before us, was founded as well upon the statute which authorized towns to make by-laws, as upon the by-law, and it was necessary to allege in the declaration, that the offence was committed as well against the form of the statute, as against the form of the by-law. 1 Chitty's Pl. 358; 3 Pickering, 462, Commonwealth *v.* Worcester; 5 ditto, 44, Commonwealth *v.* Gay.

The statute, on which that action was founded, still remains in force; and the by-law has never been repealed by the town.

But the court below were of opinion that the by-law expired with the year by its own limitation, and ceased to be in force. And if this be correct, it is clear that the verdict was right; for after a law ceases to be in force no penalty can be enforced, nor punishment inflicted for violations of the law while it was in force.

The question, then, is, did the by-law in this case cease to be in force after the year, so that no action for a penalty incurred under it can now be maintained?

There is nothing in the by-law itself which, in express terms, declares it shall not be in force after the year. When the period it was intended to regulate expired, it, without doubt, ceased to be a rule to regulate what was done afterwards. But did it cease to be the law of that period?

In many cases statutes that are repealed, or that cease to be in force by their own limitation, continue to be the law of the period when they were in force. It is, however, settled, that this is not the case with laws inflicting penalties. When these expire by their own limitation, or are repealed, they cease to be the law in relation to the past as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired. Many laws have been passed which were limited in their operation to particular seasons of the year. This was the case with the statutes which regulated the hunting of deer, and the taking of fish in rivers and ponds. But it is imagined that no one ever supposed that those laws expired by their own limitations every time the season they were intended to regulate expired, and revived again with the return of the season. The same is the case with the statutes regulating the observance of the sabbath. The statutes apply only to one day in the week. But we imagine no person will contend that they remain in force only during Sunday.

So we have a statute which prohibits the publication of the revised laws within the period of ten years from a certain time under a penalty. It seems to us that no one would seriously suppose that a penalty incurred under that statute could not be enforced after the expiration of the ten years.

A very little consideration of the subject will convince any one that a limitation of the time to which a statute is to apply, is a very different thing from the limitation of the time a statute is to continue in force.

We are, therefore, of opinion, that the instructions given to the jury by the court below were incorrect, and that the judgment must be reversed.

SECTION II.

Nature of Crime.

REX *v.* STONEHOUSE.

King's Bench. 1696.

[*Reported* 3 *Salk.* 188.]

Indictment against Elizabeth Stonehouse, for that she, intending to deprive Henry Bradshaw of several sums of money, did falsely and maliciously accuse him of felony and of robbing her.

This indictment was adjudged ill, because it was for a fact not indictable, it not being laid by way of conspiracy, so as to make it a public crime; and it being only a private wrong the party hath his remedy by action on the case.

REX *v.* BROWN.

King's Bench. 1696.

[*Reported* 3 *Salk.* 189.]

The justices made an order, that the defendant should pay Stephen Paine, a taylor, 7*l.* for work done; which he (the defendant) refusing to do, was indicted.

But it was quashed, for 't is a matter not indictable.

REX *v.* BRADFORD.

KING'S BENCH. 1698.

[*Reported* 3 *Salk.* 189.]

THE defendant was indicted for not curing the prosecutor of an ulcerated throat, as he had agreed and undertaken to do.

Quashed, for 't is no public offence, and no more in effect than an action on the case.

REX *v.* PIGOT.

KING'S BENCH. 1701.

[*Reported* 12 *Mod.* 516.]

HE was convicted upon an indictment for misdemeanor in attempting forcibly to carry away one Mrs. Hescot, a woman of great fortune.

LORD HOLT, C. J. Sure this concerns all the people in England that would dispose of their children well.

And he was fined two hundred marks, and the lady's maid, who was privy to the contrivance, was fined twenty marks, and to go to all the courts with a paper upon her, with her offence writ in large characters.

REGINA *v.* JONES.

QUEEN'S BENCH. 1704.

[*Reported* 2 *Ld. Raym.* 1013.]

MR. PARKER moved to quash an indictment. It is, that the defendant came to J. D. and pretended to be sent to him by F. S. to receive 20*l.* for his use; whereas F. S. did not send him. This is no crime, and he has remedy by action.

LORD HOLT, C. J. It is no crime unless he came with false tokens. Shall we indict one man for making a fool of another? Let him bring his action.

POWELL, J., agreed. *Quash it nisi.*

ATCHESON *v.* EVERITT.

KING'S BENCH. 1776.

[*Reported* 1 *Cowp.* 382.]

THIS was an action of debt upon the stat. 2 Geo. 2, c. 24, sect. 7, against bribery. Plea, Not guilty. Verdict for the plaintiff.

On behalf of the defendant, it was moved last term, that there might be a new trial; because a Quaker had been received as a witness on his affirmation; and it was objected, that this being a criminal cause, his evidence ought not to have been received.[1]

LORD MANSFIELD, C. J. . . . We come then to this question: Is the present a criminal cause? A Quaker appears, and offers himself as a witness; can he give evidence without being sworn? If it is a criminal case, he must be sworn, or he cannot give evidence.

Now there is no distinction better known than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.

Mr. Justice BLACKSTONE, and all modern and ancient writers upon the subject distinguish between them. Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal cause. It is as much a civil action, as an action for money had and received. The legislature, when they excepted to the evidence of Quakers in criminal causes, must be understood to mean causes technically criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony. The case mentioned by Mr. Rooke of Sir Watkyn Williams Wynne *v.* Middleton, *Vide* 1 Wils. 125. 2 Str. 1227, is a very full authority, and alone sufficient to warrant the distinction between civil and criminal proceedings. In that case the question was, Whether the stat. 7 & 8 Wm. 3, c. 7, was penal or remedial? The court held it was not a penal statute. But "supposing it was to be considered as a penal statute, yet it was also a remedial law; and therefore the objection taken was cured by stat. 16 & 17 Car. 2, c. 8." Now the words of exception in that statute, and also in stat. 32 Hen. 8, c. 30, and in stat. 18 Eliz. c. 14, are "penal actions and criminal proceedings." But Lord Chief Justice WILLES, in delivering the solemn judgment of the court, says, there is another act which would decide of itself, if considered in the light of a new law, or as an interpretation of what was meant by penal actions in the stat. 16 & 17 Car 2, c. 8. This is the statute of jeofails 4 Geo. 2, c. 26, for turning all law proceedings into English, and it has this remarkable conclusion, "that every statute of jeofails shall extend to all forms and proceedings in

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[1] Arguments of counsel and parts of the opinion of the court have been omitted — ED.

English (except in criminal cases); and that this clause shall be construed in the most beneficial manner." This is very decisive.

No authority whatever has been mentioned on the other side, nor any case cited where it has been held that a penal action is a criminal case; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is an appeal of murder, 2 Str. 856. But that is only a different mode of prosecuting an offender to death. Instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end, which the King's prosecution would have had if the offender had been convicted, namely, execution. and therefore, the writers on the law of England class an appeal of murder in the books under the head of criminal cases. . . .

In the case of Rex *v.* Turner, 2 Str. 1219, on a motion to quash an appointment of overseers, the court said, though the prosecution is in the King's name, the end of it is a civil remedy, and very properly allowed the Quaker's affirmation to be read.

It is extraordinary, that upon all the cases of attachment not one was argued upon the ground of its being a criminal case; and to be sure the exception might as well hold on an affirmation taken to hold to bail; because it deprives a man of his liberty. The very last attachment for non-performance of an award was obtained in this court upon a Quaker's affirmation, and not a word said by way of objection to it. That was the case of Taylor *v.* Scott.

We are not under the least embarrassment in the present case: for there is not a single authority to prove, that upon a penal action a Quaker's evidence may not be received upon his affirmation. Therefore, I am of opinion that Mr. Justice NARES did perfectly right in admitting this Quaker to be a witness upon his affirmation; and consequently that the rule for a new trial should be discharged.

The three other Judges concurred.

Rule discharged.

BANCROFT *v.* MITCHELL.

QUEEN'S BENCH. 1867.

[*Reported L. R.* 2 *Q. B.* 549.]

THIS was an action for false imprisonment. The plaintiff was arrested while he was protected from arrest on civil suits by an order of the Court of Bankruptcy. The defence was that the plaintiff was arrested on a warrant for failure to obey the order of a magistrate for paying 3*s.* per week for the support of his mother. At the trial the jury found one farthing damages.

The learned judge, being of opinion that the plaintiff was not protected from arrest, directed a nonsuit, with leave to the plaintiff to move to enter a verdict for 15*l.* and a farthing.

A rule was accordingly obtained.[1]

Blackburn, J. The question which arises under s. 113 of 12 & 13 Vict. c. 106 is, whether or not the plaintiff was protected by the order of the county court from the process under which he was arrested. That depends upon the nature of the process under which he was arrested and the nature of the process from which the bankrupt is protected. Section 113 relates back to s. 112, which provides that, if a bankrupt be not in prison, he shall be free from arrest in coming to surrender, and after such surrender for such further time as shall be allowed him by the commissioner; and if he be in prison he may be brought up to be examined or to surrender, and after he has been adjudged a bankrupt and has surrendered and obtained his protection from arrest, if he be in prison or arrested for debt, the Court may order his immediate release. Now, the words of s. 112 are nearly similar to those contained in the bankruptcy acts passed before 12 & 13 Vict. c. 106, and the point was considered in Darby *v.* Baugham, 5 T. R. 209, and the decision of the Court was, that the object of the enactment then in force was to give protection to the same extent, and in the same way, to a bankrupt, as a witness who was going to court to give evidence would receive protection, and therefore a bankrupt's creditors could not arrest him as he was going to surrender. The protection which the bankrupt receives being analogous to that accorded to a witness, the process against which he is protected is in the nature of civil process, but if on the other hand the process is in the nature of criminal process he is not protected.

The question remains, what is the nature of the process under which the plaintiff was arrested? What is it that the plaintiff has done or omitted to do? He is the son of a woman who is chargeable to the parish, and he is of sufficient ability to support her. There was a moral duty on him, but at common law no legal duty, to support her. By statute 43 Eliz. c. 2, s. 7, it is enacted, that the children of every poor person not being able to work, being of sufficient ability, shall, at their own charge, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein. It was as a punishment for the disobedience of an order made under this section that the plaintiff was arrested. Mr. Williams' argument is that the plaintiff was arrested for not paying a sum of money which he was ordered to pay to the parish, and therefore it was only for the non-payment of a debt that he was arrested. But the payment of the sum is only one mode by which the plaintiff complies with the statute. The statute makes what was a duty of imperfect obligation a positive duty. I agree that the fact that an indictment will lie for a disobedience of an order of sessions is no reason that the disobedience should be an offence of a criminal nature. The offence here is that the plaintiff being of ability would not support his impotent relative — that is a duty the neglect of which, though only morally wrong before the statute, is made a crime by the statute. It seems to me, therefore, that the commitment is not in the nature of civil, but of criminal process to punish the plaintiff for not performing the duty imposed on him by statute. It is quite true that on payment of the money he would get off the imprisonment, but still it is in the nature of criminal process, and consequently the plaintiff was not entitled to his discharge. He must, therefore, fail to recover the 15*l.* penalty or the farthing damages which the jury have given him, because he was properly imprisoned as a misdemeanant, and not as a debtor. There was evidence that it was necessary for his health, and for the sake of cleanliness, that his hair and whiskers should be cut, and it was a question for the jury whether there was any excess in this respect, and I think we must take it there was none.

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[1] This short statement of the facts is substituted for that of the Reporter. Arguments of counsel are omitted. — Ed.

MELLOR, J. I am of the same opinion. I was impressed by the argument of Mr. Williams that whether the plaintiff could be indicted or not for a disobedience of the order, was not the test whether the offence was criminal or not. But I have come to the conclusion that the duty of a son to support his mother, having been originally moral only, was made a positive duty by the statute, which requires that, in the event of the son neglecting that duty, he shall pay such sum as the justices shall order, and then the ultimate enforcement of that duty is carried out by fixing a penalty, and in the event of the nonpayment of that penalty a punishment of not more than three months imprisonment is imposed. That is in the nature of a punishment for a criminal offence. It is not at all analogous to the case of an indictment for disobeying an order of sessions for the payment of poor-rates, nor to an attachment for nonpayment of money pursuant to the order of the Court of Chancery, where the process is in the nature of an execution for a debt. The circumstances of this case show that the imprisonment is a punishment for an offence, and not for enforcing a mere obligation to pay money. The plaintiff, therefore, is not entitled to the penalty for which he sues, nor to the damages the jury have given him; the rule must be discharged. *Rule discharged.*

STATE *v.* BALDWIN.

SUPREME COURT OF NORTH CAROLINA. 1835.

[*Reported* 1 *Dev. & Bat.* 195.]

GASTON, J.[1] . . . The act here charged is not made up of a number of acts frequently repeated, and which cannot be distinctly and specially set forth without inconvenient prolixity. It is an act single and distinct, and committed on a particular occasion. It is charged that the defendants assembled at a public place, and profanely and with a loud voice cursed, swore, and quarrelled, in the hearing of divers persons, and it is alleged, that by means thereof a certain singing school then and there kept and held was broken up and disturbed. This profane and loud cursing and quarrelling on *that particular occasion*, might have been an annoyance to those who heard and witnessed it; but it could not have been an annoyance to the citizens in general, unless there were some *other* facts in the case. If there were such other facts, then these ought to have been set forth; for an indictment must specify all the facts which constitute the offence. It is possible that a frequent and habitual repetition of acts which singly are but private annoyances may constitute a public or common nuisance. But if so, this frequent and habitual repetition should be appropriately charged. No injurious consequences of an abiding kind, and therefore affecting not simply those present at the commission of the act, but affecting the citizens successively, and as they come within the reach of these consequences, are charged, or can be presumed to have followed from the act. "The singing school" is indeed said to have been broken up and disturbed. Of whom that school was composed does not even appear, but whether it consisted of the defendants or of others its interruption cannot be legally pronounced an inconvenience to the whole community. The loss of instruction in the accomplishment, to those who would fain acquire it, does not very gravely influence the good order or enjoyment or convenience of the citizens in general, so as to call for redress on the complaint of the state.

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[1] Part of the opinion is omitted. — ED.

If we sustain this as an indictment for a common nuisance, we shall be obliged to hold, that whenever two or more persons talk loud or curse or quarrel in the presence of others, it may be charged that this was done to the common nuisance, and if so found, will warrant punishment as for a crime. This would be either to extend the doctrine of common nuisances far beyond the limits within which they have hitherto been confined, or to allow of a vagueness and generality in criminal charges, inconsistent with that precision and certainty on the records so essential as restraints on capricious power, and so salutary as the safeguards of innocent men.

Independently of the averment "to the common nuisance," the indictment contains no criminal charge. No conspiracy is alleged, no special intent or purpose is averred, which would impress an extraordinary character on the act done. The persons disturbed are not represented as having been engaged in the performance of any public duty — as engaged in religious worship, attending at an election, or at a court. Upon a demurrer to the indictment, we should be unable to render a judgment for the state. It is our opinion, therefore, that there is no error in the proceedings below, and that the judgment appealed from must be affirmed.

PER CURIAM. *Judgment affirmed*

STATE *v.* STEARNS.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE. 1855.

[*Reported* 31 *N. H.* 106.]

THIS is a prosecution against the respondent, for a breach of an ordinance of the city of Portsmouth, regulating bowling alleys, commenced by a complaint before a justice of the peace.[1]

A warrant was issued upon this complaint, returnable before the police court of the city of Portsmouth, and the respondent being there found guilty, took an appeal to the court of common pleas.

In the court of common pleas, the respondent was ordered to pay the costs of the copies, and entry in that court, to which order he excepted. The respondent demurred to the complaint and declaration in this court, and the court sustained the demurrer and dismissed the complaint. The respondent then moved for costs of this court, and also of the police court, to be taxed against the city of Portsmouth, or the complainant in said prosecution, which motion was refused by the court, and the respondent excepted.

The penalty to be recovered for the breach of this ordinance is, by law, to be appropriated for such uses as shall be directed by the city council of said city.

The questions arising upon these exceptions were transferred to this court for decision.

BELL, J. . . . It is contended for the respondent that this proceeding is not in its nature criminal, but is essentially a civil action, falling within the statute rule that "costs shall follow the event of every action or petition, unless otherwise directed by law, or by the court." Rev. Stat. ch. 191, § 1. And first it is said that the form of proceeding by complaint is not conclusive that the case is of a criminal nature, and to this position we are inclined to yield our assent; but we think it very clear that a statute provision prescribing such proceedings in a given case, as are usually made appropriate by the law to criminal cases, is strong evidence that the cases were regarded by the legislature as of a criminal nature.

We think, too, it may, in general, be justly inferred, where the legislature prescribe a course of proceedings adopted by the common law for proceedings of a nature entirely different, that the design of the legislature was to prescribe all the known and usual incidents of the prescribed process, and to give to parties the advantages of proceedings in that form. As, if the legislature grant a remedy in assumpsit, where, at common law, trespass would be appropriate, they design that the action of assumpsit shall retain its proper character and rules in that case.

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[1] The form of the complaint and part of the opinion of the court are omitted.— ED.

Neither does the appropriation of the fine or penalty imposed in a given case, whether it be to the state, county, or town, or to a corporation, or individual, furnish any decisive test that a proceeding is criminal or civil. When a statute forbids fraudulent mortgages and the concealment of attachable property, it by no means follows, because half the fine is given to the complainant, that the prosecution is civil, nor would it do so if the whole fine were so appropriated.

The question whether a legal proceeding is to be deemed civil or criminal, or as partaking of the nature of civil and criminal proceedings, is to be determined by the consideration whether the law is designed to suppress and punish a public wrong, an injury affecting the peace and welfare of the community and the general security, or whether it is designed mainly to afford a remedy to an individual for an injury done to his person or property. Upon this question the appropriation of the fine or penalty has a bearing, since, if it is applied to the public use, no idea can be entertained that the proceeding is designed as a remedy for a private loss or injury, though it may sometimes have a different tendency, where the amount is appropriated to the use of a suffering party.

And, in a similar way, the adoption of a course of proceeding usual in criminal cases alone may bear upon the main question before referred to, because, ordinarily, proceedings adapted to the punishment of offences are, to a great degree, unsuitable for the redress of private injuries. The party injured has no exclusive privilege to institute criminal proceedings; they are equally open to others; he has no control over such prosecutions, which are generally managed by the public authorities; the fines and penalties are, for the most part, payable to others, and liable to be remitted by the proper officers without reference to his wishes or his interest.

This present case is one of a prosecution for an offence made penal by a city ordinance, because of its supposed evil consequences to society. It has no relation to any individual wrong, and the remedy prescribed is such as indicates a criminal proceeding. It is prosecuted by a public officer, as part of his official duty, but might be prosecuted by any other person as well. The fine is payable to the city, but not to compensate any wrong to the corporation. The burden of administering justice is here imposed upon counties, cities, and towns, and fines and forfeitures are payable to them, as the representatives of the public, to aid in defraying this part of the expense of civil government. The case then seems to us to lack all the indicia of a civil action, and to be, in fact, as it appears, a criminal prosecution.

The court were in error in requiring the costs of the copies and entry to be paid, but the costs were properly disallowed.

STATE *v.* KEENAN.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1889.

[*Reported* 57 *Conn.* 286.]

CARPENTER, J. This is a criminal prosecution for the violation of an ordinance of the city of New Haven. The City Court convicted the defendant, and he appealed to the Court of Common Pleas, criminal side. In the appellate court the defendant's counsel moved to erase the case from the docket on the ground that the alleged offence was not a crime; and on that motion the case was reserved for the advice of this court.

The ordinance is as follows: — "no vehicle, or the animals attached thereto, shall stand waiting for employment within ten feet of any cross-walk." Another section prescribes a penalty of not less than one nor more than ten dollars for every violation of the ordinance. The only question is whether such violation is a crime.

If the legislature itself had prohibited the act and prescribed the penalty in precisely the same terms, there can be little doubt that the act would be a misdemeanor and might be prosecuted criminally. It cannot be disputed that the legislature in fact granted the power to enact this by-law, and the power has been exercised. Logically it would seem to follow that the by-law should be of the same character and have the same force within local limits as if enacted by the legislature.

The test whether a proceeding is civil or criminal, is to determine whether its purpose is to redress a private or a public wrong. Is the law made to prevent a private injury or a nuisance?

In Hinman *v.* Taylor, 2 Conn. 357, which was a prosecution under the bastardy act, it was contended that because the proceeding was in form criminal it must be regarded as a criminal prosecution; but the court took a different view. SWIFT, C. J., held that the proposition that the form of the process decided the character of the action, was repugnant to reason and precedent. "Suppose," he says, "the legislature should authorize a forthwith process on a note of hand; no one will seriously pretend that this would convert an action of assumpsit into a criminal suit. To constitute a criminal suit some punishment must be inflicted in behalf of the state." He evidently regarded the object and nature of the suit as determining the character of the proceeding. Judge HOSMER, in the same case, is still more explicit. He says: "The criterion to ascertain a crime is not the mere form of process, but the nature of the act or omission. If it be a violation of a public law, it is a crime or misdemeanor." We find the same doctrine clearly stated in State *v.* Stearns, 31 N. Hamp. 106.

Let us apply that test. A criminal form of proceeding is clearly authorized, and the act is an offence against the public and not an injury to an individual. The penalty is not in the nature of compensation to the city for an injury sustained, but is designed as a punishment for a wrong done to the community — a wrong prohibited, because it may result in harm or inconvenience to individuals, who may or may not be inhabitants of the city. Thus tested the nature of the act as well as the form of process is clearly criminal.

Two reasons are urged why a criminal prosecution cannot be maintained and that the motion to dismiss should prevail. First, that the charter expressly provides that an action may be brought for the penalty in the name of the city treasurer, and that consequently that remedy alone must be pursued. But this argument overlooks the object of the by-law, which is to prevent a nuisance, a matter in its nature criminal. It is no uncommon thing for a statute to authorize an action to recover a penalty incurred by doing a forbidden act, even where a public prosecution can be sustained, as is the case in all *qui tam* actions. Here not only a civil suit but a public prosecution is authorized in the charter. But to avoid injustice it is expressly provided that "no person shall be prosecuted both civilly and criminally for the same breach of a by-law."

In the second place, it is contended that the right of imprisonment to coerce the payment of a penalty is not expressly given; and if not expressly granted, it cannot exist. This argument seems to beg the question by assuming that the sole object of the suit is to collect a penalty for the benefit of the city of New Haven; whereas the real purpose of the by-law, and consequently of the action, is to suppress a public nuisance. For that purpose there can be no serious objection to putting in operation the power and legal machinery of the state.

We advise that the motion to dismiss be denied.

In this opinion the other judges concurred.

CHAPTER II.

THE OFFENCE.

SECTION I.

Felonies.

KENNEL *v.* CHURCH.

CORNISH EYRE. 1201.

[1 *Selden Soc.* 7.]

OSBERT CHURCH, accused of the death of Roland, son of Reginald of Kennel, on the appeal of the said Reginald, was detained in gaol and defends word by word. And Reginald offers proof by the body of a certain freeman, Arkald, who has his daughter to wife, who is to prove in his stead since he has passed the age of sixty. Osbert Church defends all of it. The knights of the hundred of Penwith say that they suspect him of the said death. The knights of Kerrier say the same. The knights of Penwith say the same. The knights of Pyder say the same. Judgment: let him purge himself by water.

And Reginald is in mercy for he does not allege sight and hearing, and because he has withdrawn himself, and put another in his place, who neither saw nor heard and yet offered to prove it, and so let both Reginald and Arkald be in mercy.

Osbert is purged by the water.[1]

WISPINGTON *v.* EDLINGTON.

LINCOLNSHIRE EYRE. 1202.

[1 *Selden Soc.* 10.]

ASTIN of Wispington appeals Simon of Edlington, for that he wickedly and in the king's peace assaulted him in his meadows and put out his eye so that he is maimed of that eye; and this he offers to prove, &c. Simon comes and defends all of it word by word. And the coronors and the county testify that hitherto the appeal has been duly sued, at first by [Astin's] wife, and then by [Astin] himself.

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[1] For cases on the modern law of Homicide see Chap. XIII. — ED.

Judgment: let law be made, and let it be in the election of the appellee whether he or Astin shall carry the iron. He has chosen that Astin shall carry it. Astin has waged the law. Simon's pledges William of Laud and his frankpledge and Ralph of Stures. Astin's pledge, Roger of Thorpe, Osgot of Wispington, and William, Joel's brother.

Afterwards came [the appellor and appellee] and both put themselves in mercy.

JORDAN DE HORMED *v.* WALTER HACON.

HERTFORD EYRE. 1198.

[1 *Rotuli Curiae Regis,* 160.]

JORDAN of Hormed appeals Walter Hacon for that in the peace of the king and wickedly in felony he assaulted him in his house at Strange near Ikenton, and wounded him in the head and in the hand; and he shows the wounds and offers to prove it by his body as the court shall consider.

Walter defends all, word for word, against him as against a champion hired and paid, who twice had started on this course and as often retired without completing it.

Jordan denies that he is a champion, and pursues his suit against him.

And a jury of knights testify that on another occasion he had appealed him of the robbery of a sword and cape of which he now made no mention.

They are to have a day at Dunstable.[1]

REX *v.* HUGH.

CORNISH EYRE. 1302.

[*Year Book* 30 *&* 31 *Ed. I,* 529.]

H. was presented by the twelve of Y., for that he seized a certain girl, and carried her to his manor in a certain vill, and carnally knew her against her will.

H. was brought to the bar by Brian and Nicholas de N.

THE JUSTICIAR. Brian, we are given to understand that you would have induced the prisoner not to put himself upon the jury which accused him, and you have done ill, but because he is your relative, we are willing that you should stand by him, but not that you should act as his counsel.

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[1] For cases on the modern law of Assault see Chap. XIII., Sect. II. — ED

Brian. My lord, he is my relative, but I wish to disprove this, &c., and I desire that it should be well with him; but he will be well advised by me to refuse his common law. And lest I should be at all suspected of strife, I will withdraw.

THE JUSTICIAR. Hugh, the presentment is made to us that you carried off, &c., as is set forth; how will you acquit yourself?

Hugh. My lord, I pray that I may have counsel, lest I be undone in the King's court for lack of counsel.

THE JUSTICIAR. You must know that the king is a party in this case, and prosecutes *ex officio;* therefore the law in this case does not suffer you to have counsel against the king, who prosecutes *ex officio;* but if the woman should proceed against you, you might have counsel against her, but not against the king. And therefore we order on the king's behalf that all pleaders of your counsel withdraw. (These were removed.) Hugh, answer. You see the thing charged against you is a very possible thing, and a thing of your own doing; so you can well enough, without any counsel, answer whether you did it or not. Moreover, the law ought to be general, and applicable to all persons; and the law is that the king is a party *ex officio*, against whom one shall not have counsel; and if, in contradiction to law, we should allow you counsel, and the Jury should give a verdict in your favor (as, please God, they will do), people would say that you were acquitted by reason of the favor of the Justiciars; consequently we do not dare grant your request, nor ought you to make it. Therefore, answer.

Hugh. My lord, I am a clerk, and ought not to be required to answer except unto my ordinary.

THE JUSTICIAR. Are you a clerk?

Hugh. Yes, my lord, for I have been rector of the church of N.

Ordinary. We demand him as a clerk.

Hugh. He speaks for me.

THE JUSTICIAR. We say that you have forfeited your benefit of clergy, inasmuch as you are a bigamist, having married a widow; tell us whether she was a virgin when you married her; and it is as well to know the truth at once as to delay, for we can find out in a moment from a jury.

Hugh. My lord, she was a virgin when I married her.

THE JUSTICIAR. This should be known at once. And he asked the twelve whether Hugh, &c., who said on their oath that she was a widow when Lord Hugh married her. But note that they were not sworn anew, because they had been sworn before.

THE JUSTICIAR. Therefore this court adjudges that you answer as a layman, and agree to those good men of the twelve; for we know that they will not lie to us.

Hugh. My lord, I am accused by them; therefore I shall not agree to them. Besides, my lord, I am a knight, and I ought not to be tried except by my peers.[1]

The Justiciar. Since you are a knight, we are willing that you be judged by your peers. And knights were named; and he was asked if he wished to propound any challenges against them.

Hugh. My lord, I do not agree to them; you shall take whatever inquisition you will *ex officio*, but I will not agree.

The Justiciar. Lord Hugh, if you will agree to them, God willing, they will find for you if you will only consent to them. But if you will refuse the common law, you will incur the penalty therefor ordained, to wit, "one day you shall eat, and the next day you shall drink; and on the day when you drink you shall not eat, and *e contra;* and you shall eat barley-bread, and not wheaten-bread, and drink water," &c. explaining many reasons why it would not be well to delay at this point, but would be better to agree to these.

Hugh. I will agree to my peers, but not to the twelve by whom I am accused; wherefore hear my challenges against them.

The Justiciar. Willingly; let them be read; but if you have anything to say wherefore they ought to be removed, say it with your own voice or in writing.

Hugh. My lord, I pray counsel, for I cannot read.

The Justiciar. No, for it is a matter touching our Lord, the King.

Hugh. Do you take them and read them.

The Justiciar. No, for they ought to be proposed by your own mouth.

Hugh. But I cannot read them.

The Justiciar. How is this, that you would have claimed your benefit of clergy, and cannot read your challenges? (Hugh stood silent in confusion.) Do not be struck dumb, now is the time to talk. (To Lord N. de Leyc.) Will you read Lord Hugh's challenges?

Lord N. My lord, if I do, let me have the book which he has in his hands. (After receiving it) My lord, here are written challenges against several; shall I read them aloud?

The Justiciar. No, just read them secretly to the prisoner, for they ought to be offered by his own mouth. And so it was done. And when they had been offered by his own mouth, since they were found true challenges, those against whom they were offered were removed from the inquisition.

The Justiciar. We challenge Lord Hugh of rape of a certain woman, he denies it, and is asked how he will be tried; he says by a good jury; wherefore for good or ill he puts himself upon you; and so we enjoin you by virtue of your oath, tell us whether Lord Hugh ravished the aforesaid woman or not.

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[1] *Magna Charta* (9 H. 3.) c. 29. No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The Twelve. We say that she was ravished by force by Lord Hugh's men.

THE JUSTICIAR. Was Hugh consenting to the act or not?

The Twelve. No.

THE JUSTICIAR. Did they know her carnally?

The Twelve. Yes.

THE JUSTICIAR. Was the woman unwilling or consenting?

The Twelve. Consenting.[1]

THE JUSTICIAR. Lord Hugh, since they acquit you, we acquit you.

FABIAN *v.* GODFREY.

WILTSHIRE EYRE. 1198.

[*Abbreviatio Placitorum*, 17.]

FABIAN appealed Godfrey Spileman's son for that he and Roger his son and Humphrey his man wickedly at night burned his dwelling house; and this he offers to prove against him as of his own sight, as the court of our lord the king shall determine, considering that he is a man over age. And Godfrey defends for himself and his fellows.

The jurors being asked, said that they do not believe that Godfrey or any of his fellows did this; and that Fabian is a man who often goes out of his head.[2]

NORRIS *v.* BUTTINGHAM.

STRAFFORD EYRE. 1198.

[1 *Rotuli Curiæ Regis*, 205.]

THE jurors say that William Norris appealed William de Buttingham and Robert his son for that in the peace of the king, wickedly and in hamsoke they robbed from him six shillings and sixpence of his chattels, and robbed from his possession twenty-four lambs, and broke the doors of his house in his possession, and [robbed from him] chattels to the value of ten shillings; and this he offers to prove by his body as the court shall consider.

William and Robert defend all, word by word; and they say that Maurice held of the said William in fee; and at his death William entered into his fee, and Alexander Fitz-Philip hired of him in the fee a pasture for twenty-five sheep. And afterwards this William Norris came to that fee and carried away the lambs and put them in another fee and detained them; so that the said William de Buttingham and Robert his son went to William Fitz-Gerard, serjeant of the hundred, and through him regained possession of the sheep by replevin. And the serjeant testified to this fact.

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[1] *Credo quod deberet hic quod tamen post defuit.*—REP.

[2] For cases on the modern law of Arson, see Chap. XVIII. — ED.

And the whole county testify that men are thus appealed according to their custom.

It is considered that the appeal against them is null. Judgment: William Norris is amerced for a false appeal, and William and Robert are acquitted.[1]

REX *v.* HUGH.

WILTSHIRE EYRE. 1198.

[*Abbreviatio Placitorum*, 19.]

ROBERT DE LUCY was robbed by Hugh Brien's brother and Nicholas Fitz-priest and Elias a relative of Brien's wife, and many others whom the jurors [are unable?] to enumerate, in time of war; and the robbers have not come to the peace of our lord the king. And Brien is outlawed. And Hugh his brother and Nicholas Fitz-priest and Elias the relative of Brien's wife are to be sought through the county; and unless they appear let them be judged by law of the county.[2]

LUKE DE BROCHESHEVET *v.* WALTER DE MAREN.

HERTFORD EYRE. 1198.

[1 *Rotuli Curiæ Regis*, 160.]

THE jurors say that Luke of Brocheshevit appealed Walter of Maren and Godfrey Trenchevent of the theft of a cow. Walter was essoined as beyond sea. And Godfrey does not come. His pledge was William of Maren; so he is in mercy.

They say likewise that the said Luke appealed the said Walter for that in the peace of the king, and in felony he stole his wife Felicia and his seal and his chattels to the value of one hundred shillings; and this he offers to prove as the court shall consider. It is to await the coming of the justices.[3]

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[1] For cases on the modern law of Burglary, see Chap. XVIII. — ED.

[2] For cases on the modern law of Robbery, see Chap. XIV., Sect. XVII. — ED.

[3] For cases on the modern law of Larceny, see Chap. XIV. — ED.

HUGH OF RUPERES *v.* JOHN OF ASHBY.

Lincolnshire Eyre. 1202.

[1 *Selden Soc.* 14.]

Hugh of Ruperes appeals John of Ashby for that he in the king's peace and wickedly came into his meadows and depastured them with his cattle, and this he offers, etc. And John comes and defends all of it. And whereas it was testified by the sheriff and the coroners, that in the first instance [Hugh] had appealed John of depasturing his meadows and of beating his men, and now wishes to pursue his appeal not as regards his men, but only as regards his meadows, and whereas an appeal for depasturing meadows does not appertain to the crown of our lord the king, it is considered that the appeal is null, and so let Hugh be in mercy and John be quit.

Hugh is in custody, for he cannot find pledges.

SECTION II.

Misdemeanors.

REX *v.* COOK.

Middlesex Sessions. 1696.

[*Reported Comberbach,* 382.]

Upon an indictment setting forth that Sir John Friend and Sir William Perkins being attainted and about to be executed at Tyburn for high treason, etc., the defendants, conspiring and intending (as much as in them lay) to justify, or at least to extenuate and lessen their crimes, and to induce his majesty's subjects to believe that they died rather as martyrs than as traitors, and to incite the king's subjects to commit the like treasons, they did take upon them to absolve, and did pronounce a form of absolution of them, the said Sir William Perkins and Sir John Friend, without any repentance, or any signs of repentance by them given.

It was proved that the defendants asked the criminals the several questions directed by the rubrick in the office of visitation of the sick, and Mr. Cook pronounced the words of absolution of one of the traitors, Mr. Snatt and one Mr. Collier (who is not now indicted) laying their hands upon his head, and after the words pronounced saying Amen; and Mr. Collier pronounced the words as to the other traitors, they all three laying on their hands, etc.

It was proved that the defendants were earnestly requested by Sir William Perkins and Sir John Friend to assist them at the place of execution; and therefore the jury were directed to acquit them of the conspiracy, though the Attorney General said the indictment was not for conspiracy, and *conspirantes* was put adjectively only to introduce the other matter, and therefore was not material.

And HOLT [L. C. J.] directed the jury that this proceeding of the defendants was certainly scandalous and irregular; for if the criminals had before made a private confession, the absolution should have been private likewise; but if they would give a public absolution, they ought to have required as public a confession, and particularly with respect to those crimes for which they were attainted, being so notorious, etc. However, if the jury were of opinion that they did it only ignorantly and by mistake (in which case it is properly conusable in the Spiritual court), then to acquit them; but if they did it with a design to affront the government, and to vilify the justice of the nation, then to find them guilty.

But at the instance of the defendant's counsel it was directed to be found specially that Snatt laid his hand on the head, and was assistant while the other pronounced the words of absolution, and afterwards Snatt said Amen (it being laid *quod pronuntiaverunt*).

And accordingly the jury acquitted them of the conspiracy, and found Cook guilty of the rest; and as to Snatt, *ut supra*.[1]

STATE *v.* JACKSON.

SUPREME JUDICIAL COURT OF MAINE. 1881.

[*Reported* 73 *Maine*, 81.]

LIBBEY, J. This is an indictment against the defendant for unlawfully and wilfully attempting to influence a qualified voter to give in his ballot at a municipal election, in the city of Rockland, by offering and paying him money therefor.

The offence charged is not within R. S., c. 4, § 67.

Is bribery at a municipal election a misdemeanor at common law in this state? It is claimed by the learned counsel for the defendant, that it is not recognized as such in this country. We think it is. It was an offence at common law in England. 1 Russell on Crimes, 154; Plympton's Case, 2 Ld. Raym. 1377; Rex *v.* Pitt, 3 Burr. 1335.

The common law of England upon the subject of bribery, fraud and corruption at elections, is generally adopted as the common law in this country. Comm. *v.* Silsbeee, 9 Mass. 417; Comm. *v.* Hoxey, 16 Mass. 385; 1 Bish. Crim. Law, 355; Walsh *v.* The People, 65 Ill., 58; State *v.* Purdy, 36 Wis. 224; State *v.* Collier, 72 Mo. 13; People *v.* Thornton, 32 Hun (N. Y.) 456; Comm. of Penn. *v.* McHale, 97 Pa. 397.

Bishop in his work on Criminal Law, vol. 1, § 922, says: "We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law."

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[1] See Rex *v.* Noel, Comb. 362; Penns. *v.* Morrison, Add. (Pa.) 274. — ED.

Paxon, J., in the opinion of the court in Comm. *v.* McHale, *supra*, says: "We are of opinion that all such crimes as especially affect public society, are indictable at common law. The test is not whether precedents can be found in the books, but whether they affect the public policy or economy. It needs no argument to show that the acts charged in these indictments are of this character. They are not only offences which affect public society, but they affect it in the gravest manner. An offence against the freedom and purity of the election is a crime against the nation. It strikes at the foundation of repub can institutions. Its tendency is to prevent the expression of the w of the people in the choice of rulers, and to weaken the public con dence in elections. When this confidence is once destroyed, the end of popular government is not distant. Surely if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, the offence which involves the right of a free people to choose their own rulers in the manner pointed out by law, is not beneath the dignity of the common law, nor beyond its power to punish. The one is an annoyance to a small portion of the body politic, the other shakes the social fabric to its foundations."

We have no doubt that bribery at a municipal election is a misdemeanor punishable by the common law of this state.

An attempt to bribe or corruptly influence the elector, although not accomplished, will submit the offender to an indictment. State *v.* Ames, 64 Maine, 386.

But admitting that attempting to bribe an elector at a municipal election is an offence at common law, it is claimed by the counsel for the defendant that the indictment in this case does not properly charge such offence.[1]

Exceptions overruled, Judgment for the State.[2]

COMMONWEALTH *v.* SILSBEE.

Supreme Judicial Court of Massachusetts. 1812.

[*Reported* 9 *Massachusetts,* 417.]

The indictment charged that the defendant, being admitted as a legal voter at the town meeting holden on the eleventh day of March, 1811, at Salem, for the choice of town officers, "did then and there wilfully, fraudulently, knowingly, and designedly give in more than one vote for the choice of selectmen for said town of Salem at one time of balloting; to the great destruction of the freedom of elections, to the great prejudice of the rights of the other qualified voters in said town of Salem, to the evil example of others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid, and the law of the same in such case made and provided."

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[1] In the subsequent portion of his opinion the learned judge held that this claim was unfounded. — Ed.

[2] Acc. Taylor's Case, 12 Mod. 314; Reg. *v.* Lancaster, 16 Cox, C. C. 637; State *v.* Davis, 2 Pennew. (Del.) 139; State *v.* Ellis, 33 N. J. Law, 102.

After conviction the defendant moved in arrest of judgment, on the ground of the insufficiency of the indictment.

Dane, for the defendant. Here is no offence charged. The defendant put more than one vote for selectmen into the box at one time; and he might well do this, since not less than three selectmen were to be voted for.

The offence, if any is described in the indictment, cannot be such by the common law, since that law knows nothing of the office of selectmen. If the offence is created by statute, the indictment ought to conclude *contra formam statuti;* and if the conclusion of this be considered so, it belongs to the government to produce the statute against which the offence was committed. But none such can be found; and the usual punishment applied to the act, that of rejecting the party's vote, is probably all that the government thought necessary or convenient.

By the Statute of 1795, c. 55, a fine not exceeding twenty nor less than ten dollars was provided for such as should give in more than one vote in the election of State officers. It appears that the Legislature did not contemplate that offence, though of an higher grade than that here intended to be prosecuted, worthy of the severe punishment which may by the common law be imposed on misdemeanors. Indictments of this kind are of late origin, which is an argument that they do not lie at common law.

No fraud is alleged in the indictment; for as to the general words "fraudulently," &c., they have no operation, being merely formal.

The Solicitor-General insisted that this was a fraud, upon which the common law would animadvert. It was a direct infringement of the highest political rights of others. The indictment, as to its form, is conformed to the provisions of the statute of 1800, c. 74, respecting the votes to be given for the governor, &c. of the Commonwealth. The mischief is growing in various parts of the Commonwealth, and unless restrained will shortly destroy the purity of our elections, and with that will go our most valued political institutions.

Curia. There cannot be a doubt that the offence described in the indictment is a misdemeanor at common law. It is a general principle that where a statute gives a privilege, and one wilfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of the other voters, and for this offence the common law gives the indictment; and the conclusion of the one at bar is proper for the case.

The defendant was adjudged to pay a fine of ten dollars with the costs of prosecution.[1]

REX *v.* JONES.

King's Bench. 1740.

[*Reported* 2 *Strange*, 1146.]

He was indicted for not taking upon him the office of overseer of the poor, upon a regular appointment; and on demurrer objected, that as he was to take no oath, and the 43 *Eliz. c.* 2, had inflicted pecuniary penalties for neglect of duty to be recovered in a summary way, he could not be indicted.

Sed per Curiam, those penalties are for neglect of duty when he is the officer, whereas this indictment says he has obstinately refused to take the office upon him: the disobeying an act of Parliament is indictable upon the principles of the common law.

Judgment for the King.[2]

REX *v.* IVENS.

Oxford Circuit. 1835.

[*Reported* 7 *Car. & Payne*, 213.]

Indictment against the defendant, as an innkeeper, for not receiving Mr. Samuel Probyn Williams as a guest at his inn, and also for refusing to take his horse. The first count of the indictment averred that the prosecutor had offered to pay a reasonable sum for his lodgings; and the first and second counts both stated that there was room in the inn. The third count omitted these allegations, and also omitted all mention of the horse. The fourth count was similar to the third, but in a more general form. Plea — Not guilty.

It was opened by *Whitmore*, for the prosecution, that the defendant kept the Bell Inn, at Chepstow, and that the prosecutor Mr. Williams had gone there on horseback, on the night of Sunday the 14th of April; and that the defendant and his wife both refused him admittance into the inn.

Godson, for the defendant. — Does your Lordship think that an indictment lies against an innkeeper for refusing to receive a guest?

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[1] *Acc.* Com. *v.* Hoxey, 16 Mass. 385.

[2] See Hungerford's Case, 11 Mod. 142.

I know that an action may be brought against him if he does so; and such an action was brought against an innkeeper at Lancaster a few years ago. This is only, at most, a private injury to Mr. Williams, and not an offence against the public.

Coleridge, J. There can be no doubt that this indictment is sustainable in point of law. Mr. Serjeant *Hawkins* distinctly lays it down that an indictment lies for this offence.[1]

Coleridge, J. (in summing up). The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to this case is this: — that an indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers, and supplying them with what they want. It is said in the present case that Mr. Williams, the prosecutor, conducted himself improperly, and therefore ought not to have been admitted into the house of the defendant. If a person came to an inn drunk, or behaved in an indecent or improper manner, I am of opinion that the innkeeper is not bound to receive him. You will consider whether Mr. Williams did so behave here. It is next said that he came to the inn at a late hour of the night, when probably the family were gone to bed. Have we not all knocked at inn doors at late hours of the night, and after the family have retired to rest, not for the purpose of annoyance, but to get the people up? In this case it further appears that the wife of the defendant has a conversation with the prosecutor, in which she insists on knowing his name and abode. I think that an innkeeper has no right to insist on knowing those particulars; and certainly you and I would think an innkeeper very impertinent, who asked either the one or the other of any of us. However, the prosecutor gives his name and residence; and supposing that he did add the words "and be damned to you," is that a sufficient reason for keeping a man out of an inn who has travelled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house. It has been strongly objected against the prosecutor by Mr. *Godson*, that he had been travelling on a Sunday. To make that argument of any avail, it must be contended that travelling on a Sunday is illegal. It is not so, although it is what ought to be avoided whenever it can be. Indeed there is one thing which shows that travelling on a Sunday is not illegal, which is, that in many places you pay additional toll at the turnpikes if you pass through them on a Sunday, by which the legislature plainly contemplates travelling on a Sunday as a thing not illegal. I do not encourage travelling on Sundays, but still it is not illegal. With respect to the non-tender of money by the prosecutor, it is now a custom so universal with innkeepers, to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case no objection was made that Mr. Williams did not make a tender; and they did not even insinuate that they had any suspicion that he could not pay for whatever entertainment might be furnished to him. I think, therefore, that that cannot be set up as a defence. It however remains for me next to consider the case with respect to the hour of the night at which Mr. Williams applied for admission; and the opinion which I have formed is, that the lateness of the hour is no excuse to the defendant for refusing to receive the prosecutor into his inn. Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive. The only other question in this case is, whether the defendant's inn was full. There is no distinct evidence on the part of the prosecution that it was not. But I think the conduct of the parties shews that the inn was not full; because, if it had been, there could have been no use in the landlady asking the prosecutor his name, and saying, that if he would tell it, she would ring for one of the servants.

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[1] The evidence is omitted — Ed.

Verdict Guilty.

PARK, J., sentenced the defendant to pay a fine of 20*s.*[1]

CROUTHER'S CASE.

QUEEN'S BENCH. 1598.

[*Reported Croke Eliz.* 654.]

CROUTHER was indicted, for that a burglary was committed in the night by persons unknown, and J. S. gave notice thereof unto him, being then constable, and required him to make hue and cry, and he refused, etc. Exception was taken to the matter of the indictment, because it hath been adjudged that an hundred shall not be charged with a robbery committed in the night, because they are not bound to give attendance; no more ought a constable to do it in the night. But all the Court held the indictment to be good, notwithstanding; for it is not like to the case of an hundred; because it is the constable's duty, upon notice given unto him, presently to pursue.[1] And it was said that in every case where a statute prohibits anything, and doth not limit a penalty, the party offending therein may be indicted, as for a contempt against the statute.[1]

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[1] See Rex *v.* Taylor, Willes, 538 note; Reg *v.* James, 2 Den. C. C. 1.

Another exception was taken, because he did not shew the place of the notice; and that was held to be material. Whereupon the party was discharged.

COMMONWEALTH v. CALLAGHAN.

General Court of Virginia. 1825.

[*Reported* 2 *Virginia Cases*, 460.]

This was a case adjourned by the Superior Court of Law of Alleghany County. The case itself is fully set forth in the following opinion of the General Court, delivered by Barbour, J.: —

This is an adjourned case from the Superior Court of Law for the County of Alleghany.

It was an information filed against Callaghan and Holloway, two of the justices of Alleghany, alleging in substance the following charge: That at a court held for the county of Alleghany, there was an election for the office of commissioner of the revenue and of clerk of said court, when the defendants were both present, and acting in their official character as magistrates in voting in said election; that the defendant Callaghan, in said election for commissioner of the revenue, wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement did vote, for a certain W. G. Holloway, to be said commissioner, in consideration of the promise of the defendant Holloway that he would vote for a certain Oliver Callaghan to be clerk of said court; and that the defendant Holloway in the said election of clerk wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement did vote, for a certain Oliver Callaghan to be said clerk, in consideration of the promise of the defendant Callaghan that he would vote for the aforesaid W. G. Holloway to be commissioner. To this information the defendants demurred generally, and there was a joinder in the demurrer. The Superior Court of Law of Alleghany, with the assent of the defendants, adjourned for novelty and difficulty to this court the questions of law arising upon the demurrer to the information, and particularly the following, namely: —

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[1] See Reg. v. Wiatt, 11 Mod. 53; State v. Haywood, 3 Jones (N. C.), 399.

[2] See State v. Parker, 91 N. C. 650. — Ed.

1. Is there any offence stated in said information for which an information or indictment will lie?

2. Is the offence charged in the said information within the true intent and meaning of the Act of the General Assembly entitled "An Act against buying and selling offices," passed Oct. 19, 1792, in page 559, 1st vol. Rev. Code of 1819?

3. If the offence be within the said act, is the information filed in this case a good and sufficient information?

The first and second questions, for the sake of convenience, will be considered together.

It is proper to premise that a general demurrer admits the truth of all facts which are well pleaded; there being such a demurrer in this case, and the information distinctly alleging that the defendants, in giving their votes respectively, acted wickedly and corruptly, such wicked and corrupt motive will be considered throughout as forming a part of the case.

The court are unanimously of opinion that the case as stated in the information is not within the true intent and meaning of the Act of Assembly referred to in the second question. That act embraces two descriptions of cases: 1. The sale of an office or the deputation of an office; 2. The giving a vote in appointing to an office or the deputation of office. It would be within the latter description that this case would fall, if within either; but the court are decidedly of opinion that this case does not fall within this description, because the plain construction of the statute is that the penalties which it denounces are incurred only by those who receive or take, either directly or indirectly, any money, profit, &c., or the promise to have any money, profit, &c., to their own use or for their own benefit. In this case it appears from the information that the promise of each of the defendants to the other, which constituted the consideration of the vote of that other, and the vote given in consequence of such promise, inured not to the benefit of the defendants or either of them, but to the benefit of others. If indeed it had been alleged in the information that the persons for whom the votes were given, were, if elected, to have held them upon any agreement, that the defendants should in any degree participate in their profits or receive from the holders of them any benefit or advantage, the case would have been different, for then the defendants would have received a profit indirectly, and thus would have fallen within the statute; but there is no such allegation.

The court being thus of opinion that this case was not embraced by the statute, but at the same time considering that that system of criminal jurisprudence must be essentially defective which had provided no punishment for acts such as are charged in the information, and which merit the reprehension of all good men, were led to inquire whether the acts charged in the information did not constitute an offence at common law; and they are of opinion that they do.

In relation to those offences which rise to the grade of felony there is usually, particularly in the designation of them by name, an accuracy in the definition; as, for example, murder, burglary, arson, &c., in each of which the term *ex vi termini* imports the constituent of the offence; but in the general classification of crimes whatever is not felony is misdemeanor. In relation to these, then, they are not only numerous but indefinitely diversified, comprehending every act which, whilst it falls below the grade of felony, is either the omission of something commanded or the commission of something prohibited by law. As to these the law can do no more than lay down general principles, and it belongs to the courts of the country to apply those principles to the particular cases as they occur, and to decide whether they are or are not embraced by them. Thus the law, as a general proposition, prohibits the doing of any act which is *contra bonos mores*. The particular acts which come up to this description it is impossible to include in any precise enumeration; they must be decided as they occur, by applying this principle to them as a standard. Thus, again, it is now established as a principle that the incitement to commit a crime is itself criminal under some circumstances. 6 East, 464; 2 East, 5. As for example, the mere attempt to stifle evidence, though the persuasion should not succeed. Cases of this kind may be as various as the varying combinations of circumstances.

To come more immediately to the present case, we hold it to be a sound doctrine that the acceptance of every office implies the tacit agreement on the part of the incumbent that he will execute its duties with diligence and fidelity. 5 Bac. Abr. 210, Offices and Officers, Letter M. We hold it to be an equally sound doctrine that all officers are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party aggrieved, loss of their offices, &c. 5 Bac. Abr. 212, Letter N.

And further, that all wilful breaches of the duty of an office are forfeitures of it, and also punishable by fine (Co. Litt. 233, 234), because every office is instituted, not for the sake of the officer, but for the good of another or others; and, therefore, he who neglects or refuses to answer the end for which his office was ordained should give way to others, and be punished for his neglect or oppressive execution.

Let us apply these principles to the present case. The defendants were justices of the peace, and as such held an office of high trust and confidence. In that character they were called upon to vote for others, for offices also implying trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers, and yet upon the pleadings in this case it appears that they wickedly and corruptly violated their duty and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior the qualifications to their competitors. It would seem, then, upon these general principles that the offence in the information is indictable at common law. But there are authorities which apply particularly to the case of justices. In 1 Bl. Com. 354, n. 17, Christian, it is said if a magistrate abuse his authority from corrupt motives he is punishable criminally by indictment or information.

Again, where magistrates have acted partially, maliciously, or corruptly, they are liable to an indictment. 1 Term Rep. 692; 1 Burr. 556; 3 Burr. 1317, 1716, 1786; 1 Wils. 7. An instance of their acting partially is that of their refusing a license from motives of partiality, the form of the indictment for which is given in 2 Chitty's Crim. Law, 253.

We are then of opinion, for the reasons and upon the authorities aforesaid, that the offence stated in the information is a misdemeanor at common law for which an information will lie, but that it is not within the statute referred to.

In answer to the third question we are of opinion that the information is a good and sufficient one.

All which is ordered to be certified to the Superior Court of Law for Alleghany County.

REX *v.* SEYMOUR.

KING'S BENCH. 1740.

[*Reported* 7 *Mod.* 382.]

SEYMOUR, Boyce, Blatch, and Duffield attended at the king's bench in order to receive judgment, upon their being found guilty upon several informations.[1]

CHAPPLE, the junior Judge, having attended Baron Carter, who tried the informations, reported to the Court that there were three several informations, one against Seymour, and Boyce, a justice of peace; another against the same Seymour, and Blatch, a justice of the peace; and a third against the said Seymour, and Duffield, a justice of the peace.

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[1] Acc. Rex *v.* Chalk, Comb. 396; Anon., 6 Mod. 96; Reg. *v.* Buck, 6 Mod. 306; Tyner *v.* U. S., 23 App. D. C. 324, 362; People *v.* Coon, 15 Wend. (N. Y.) 277; Com. *v.* Brown, 23 Pa. Super. Ct. 470. "However reprehensible it may be for a member of the legislature to keep 'open house' for the entertainment of members, where they may partake of 'light refreshments, wine, beer, liquors, and cigars,' it falls short of establishing a case of bribery. A 'bribe' is defined to be a 'price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct of a judge, witness, or other person.' 'To bribe' means 'to give a bribe to a person to prevent his judgment or corrupt his actions by some gift or promise.' To give entertainments for the purpose of unduly influencing legislation is wholly bad in morals, but does not constitute the crime of bribery." GRANT, J., in Randall *v.* Evening News Ass'n, 97 Mich. 136, 56 N. W. 361.

The offence stated in the information, was matter of extortion used by Seymour and the three justices against several foreigners who were settled in the corporation of Colchester, and who had applied to those three justices for licences to sell ale.

The proceedings were thus: Seymour and these three justices met in order to grant licences to sell ale; when the burgesses applied they had their licences upon the common and ordinary terms, but when any foreigner came for a licence, the constables who were stationed to guard the outward door suffered none but the foreigner who applied for a licence to enter into the first room, where Seymour was; and the general question Seymour put to the foreigner was, Whether he was willing to pay ten shillings for his licence? If he refused he was dismissed, but if he agreed to pay it to Seymour his sureties were called, and he was admitted to go along with them into the room to the three justices, where his recognizance was taken and his licence granted. These informations were tried by three special juries of gentlemen; the facts charged were very fully proved upon the trial; and there were above one hundred licences granted at the rate of ten shillings apiece.

When Chapple, Justice, had certified as above, Serjeant Price and Mr. Bootle moved, in mitigation of the fines that should be set by the Court, upon several affidavits to shew *quo animo* the fact was done, as that such fines had been taken for twenty-five years past; that this whole procedure was by the consent and direction of all the other ruling members of the corporation; and that the money was applied to public uses, as for repairing bridges, streets, etc.

The Court suffered the affidavits to be read, though it was opposed by the counsel on the other side.

THE COURT. This crime appears upon the informations, and the affidavits for mitigation, to be of a very high nature; for here are three justices, who are intrusted by the act of Parliament of the 5. & 6. Edw. 6, c. 25, with a discretionary power to grant or refuse licences to the persons who apply for them, for each of which the statute allows one shilling. It appears there were several applications made for licences, and that the justices granted them to anybody that was willing to pay ten shillings, without any regard to the person, whether he was qualified within the intent of the act or not. There was indeed a distinction made between townsmen and foreigners, the latter being obliged to pay much more than the former; and there is no doubt but that by the by-laws of a corporation, in a great many instances, foreigners may be obliged to pay greater fees than the townsmen, as for the setting up of any trade, etc., but selling of ale is not a trade, or the subject matter of any by-law. Licencing public houses is a trust reposed in justices of the peace by the legislature, and when they execute it in this extraordinary manner, neither the custom of doing it for twenty-five years before, nor the application of the money to public purposes, nor the consent of the other ruling members of the borough, can excuse these justices from the censures of this Court.

Therefore the three justices must be fined one hundred pounds each, and Seymour, who appears to be an agent or instrument to the justices, must be fined one hundred and twenty pounds, viz., the sum of forty pounds on each information.

The justices and Seymour had in court all the fine money, except one hundred pounds, which they offered to pay.

But the Court said, Let them be gentlemen of ever so large a fortune, they must pay the whole fine in court or be committed, and checked one of the clerks in court for proposing to undertake for the payment of the one hundred pounds. The justices then paid the three hundred and twenty pounds, and gave their note for the remaining one hundred pounds, which was accepted by the Court as payment.[1]

TAYLOR'S CASE.

KING'S BENCH. 1676.

[*Reported* 1 *Ventris*, 293.]

AN information exhibited against him in the crown office, for uttering of divers blasphemous expressions, horrible to hear; viz., That Jesus Christ was a bastard, a whoremaster; Religion was a cheat; and that he neither feared God, the Devil, or man.

Being upon his trial, he acknowledged the speaking of the words, except the word bastard; and for the rest, he pretended to mean them in another sense than they ordinarily bear; viz., whoremaster, *i. e.*, that Christ was master of the whore of Babylon, and such kind of evasions for the rest. But all the words being proved by several witnesses, he was found guilty.

And HALE said, That such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, State and government, and therefore punishable in this court (for to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preferred); and that Christianity is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law.

Wherefore they gave judgment upon him; viz., To stand in the pillory in three several places, and to pay one thousand marks fine, and to find sureties for his good behavior during life.[2]

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[1] See Rex *v.* Roberts, Comb. 193.

[2] See State *v.* Williams, 4 Ire. (N. C.) 400.

HUGH MANNEY'S CASE.

STAR CHAMBER. 16.

[*Reported* 12 *Coke*, 101.]

IN an information in the Exchequer against Hugh Manney, Esq., the father, and Hugh Manney, the son, for intrusion and cutting of a great number of trees, in the county of Merioneth, the defendants plead not guilty; and Rowland ap Eliza, Esq., was produced as a witness for the King, and deposed upon his oath to the jurors, that Hugh the father and the son joined in sale of the said trees, and commanded the vendees to cut them down, upon which the jurors found for the King with great damages; and judgment upon this was given, and execution had of a great part.

And Hugh Manney, the father, exhibited a bill in the Star Chamber, at the common law, against Rowland ap Eliza, and did assign the perjury in this, that the said Hugh, the father, did never join in sale, nor command the vendees to cut the trees; and the said Rowland ap Eliza was by all the lords in the Star Chamber convict of corrupt and wilful perjury; and it was resolved by all, that it was by the common law punishable before any statute; and although that the witness depose for the King, yet he shall rather be punished than for another; for the King is the head and fountain of justice and right; and he, who perjures himself for the King, doth more offend than if it was in the case of a subject.

ANONYMOUS.

ASSIZES. 1326.

[*Reported Year Book*, 1 *Ed.* iii. 16, *pl.* 7.]

A MAN was indicted for felony, and put in the stocks; another comes and enters the house (without breaking the house) and takes him out of the stocks and gets him away; and for this act he was arrested and brought before the justices and arraigned, etc., on indictment, and put himself, etc.; and all this was found by an inquest.

BOURCHIER, C. J. C. P., said that he should rest in the grace of the King, and have perpetual prison or other punishment according to the King's will. But he should never be hanged, because the principal cause was not tried, nor had the prisoner been attainted; for he might yet be acquitted. But it is otherwise when a man is convicted by the inquest on which he has put himself, or by confession, or by the record, or is otherwise adjudged to death; he who rescues such a man shall be hanged, etc.

ANONYMOUS.

KING'S BENCH. 1686.

[*Reported* 3 *Mod.* 97.]

THE defendant was indicted for barratry. The evidence against him was, That one G. was arrested at the suit of C. in an action of four thousand pounds, and was brought before a judge to give bail to the action; and that the defendant, who was a barrister at law, was then present, and did solicit this suit, when in truth at the same time C. was indebted to G. in two hundred pounds, and that he did not owe the said C. one farthing.

HERBERT, C. J., was first of opinion that this might be maintenance, but that it was not barratry, unless it appeared that the defendant did know that C. had no cause of action after it was brought. If a man should be arrested for a trifling cause, or for no cause, this is no barratry, though it is a sign of a very ill Christian, it being against the express word of God. But a man may arrest another thinking that he has a just cause so to do, when in truth he has none, for he may be mistaken, especially where there have been great dealings between the parties. But if the design was not to recover his own right, but only to ruin and oppress his neighbor, that is barratry. A man may lay out money in behalf of another in suits of law to recover a just right, and this may be done in respect of the poverty of the party; but if he lend money to promote and stir up suits, then he is a barrator. Now it appearing upon the evidence that the defendant did entertain C. in his house, and brought several actions in his name where nothing was due, he is therefore guilty of that crime. But if an action be first brought, and then prosecuted by another, he is no barrator, though there is no cause for action.

ANONYMOUS

KING'S BENCH. 1688.

[*Reported Comberbach,* 46.]

A MAN was indicted for words spoken of a justice of peace [a buffle-headed fellow], and an exception was taken that the words were not indictable.

But *per Curiam*, Because it appears they were spoken of him in the execution of his office, the indictment is good. And *per* [Wright] C. J., All actions for slandering a justice in his office, may be turned into indictments.[1]

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[1] See Pocock's Case, 7 Mod. 310; *Ex parte,* The Mayor of Great Yarmouth, 1 Cox, C. C. 122.

REGINA *v.* STEPHENSON.

CROWN CASE RESERVED. 1884.

[*Reported* 13 *Q. B. D.* 331.]

CASE stated by HAWKINS, J. The defendants were convicted upon an indictment charging them with having burnt the dead body of an illegitimate infant child (named George Stephenson) to which the defendant Elizabeth Stephenson had recently given birth, with the intent to prevent the holding of an inquest upon it. Counsel for the defendants objected to the sufficiency of the indictment.[1]

GROVE, J. This conviction should be affirmed. There are two points raised by the case which has been stated; first, is it indictable at common law to prevent the holding of a coroner's inquisition? and, secondly, is there enough before us to shew that the coroner had jurisdiction to hold the inquest?

No case that has been referred to is absolutely in point, but there are many cases which shew that interference with statutory duties and the preventing of their performance is a misdemeanor in general at the common law. It is so in cases where statutory provisions are, as here, for the public benefit, and especially where, as here, the matter is one concerning life and death. It is most important to the public that a coroner who on reasonable grounds intends to hold an inquest should not be prevented from so doing. The consequences would otherwise be most formidable, especially in the case, I fear, of young children, for anyone might prevent the holding of an inquest by the destruction of a dead body with impunity, unless it could be proved that the death had been caused by violence. The only evidence might be the examination of the body itself. It might be that the only witness of the death was the murderer of the person found dead. To hold it no offence to prevent the administration of the law by preventing an inquest being held, unless proof could be given of the cause of death, and that it was a violent cause, would set at nought the protection which there is at present to the public. The inquest is itself an inquiry into the cause of death and the present indictment is framed upon this view, the contrary view involves this proposition, that a coroner should be certain of the cause of death before he ventures to hold his inquest — this is certainly not the law. It is certainly not what the statute governing this matter says. A coroner acts and ought to act upon information, not upon conclusive evidence. He inquires in cases of sudden death where such inquiry is desirable. Bracton Lib. iii. (De Corona) ch. v, and the Mirrour (The Mirrour of Justices, by Horne, p. 38), shew that the statute is but an affirmation or confirmation of the common law. In the statute there is nothing about murder, the words are "suddenly dead" and the statute requires an examination of the dead body, the whole wording of the statute shews that it is the bodies that are to be examined to find the cause of death. A coroner's inquiry would be useless if the coroner previously had by evidence to satisfy himself of the cause of death. In the present case it appears that there was at the least a reasonable suspicion, and indeed probably more than a reasonable suspicion. The police informed the coroner, the information came from parties whose business it was to look into these matters, probably the coroner honestly believed the information thus given to him. It is clear to my mind that in holding an inquest the coroner would only in such a case be doing his duty, and in this duty the defendants obstruct him by surreptitiously taking away the body and burning it. Their object was to prevent the inquest; the case in Mod. Rep. (7 Mod. Rep. Case 15), seems to me in point. In the particular case the death was violent, that either means, appeared to have been a violent one, or it means, was discovered to have been a violent one when the inquest was held, but Lord Holt seems to indicate that the offence was the burying the child before the inquest so as to obstruct the inquest. If it is a crime to bury, *a fortiori* it is one to burn a body, because if you bury, exhumation is possible, but if you burn, the body is destroyed and examination is no longer possible. However, here it is enough to say the coroner had a right to hold the inquest, and the prisoners were wrong in secretly and intentionally burning the body to obstruct him in his duty of holding such inquest.

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[1] This short statement is substituted for that of the Reporter. — ED.

Stephen, J. I am of the same opinion. It is a misdemeanor to destroy a body upon which an inquisition is about to be properly held, with intent to prevent the holding of that inquest. This appears from many authorities and from the case in Mod. Rep. (7 Mod. Rep. Case 15). Is it true that it is a misdemeanor to interfere in a case where the coroner is of opinion that an inquest must be held, or is it necessary that the facts should be such that the inquest ought to be held? This matter is not absolutely covered by authority. In one sense we do create new offences, that is to say, that as a Court we can and do define the law from time to time and apply it to the varying circumstances which arise. In Reg. *v.* Price, 12 Q. B. D. 247, 248, I said, "it is a misdemeanor to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest, and to prevent him from doing so by disposing of the body in any way — for an inquest must be held on the view of the body — is a misdemeanor." I say the same thing now, and I concur in my brother Grove's view, indeed any other view would in my opinion be absurd. If a person destroys a dead body or removes it to prevent an inquest being held he is guilty of an offence if the inquest intended to be held was one that might lawfully be held. As has been said in the course of the argument, a man who obstructs an inquest in this way takes his chance of the inquest being one that it was right to hold. It is an obstruction of an officer of justice, it prevents the doing of that which the statute authorizes him to do.[1]

REX *v.* TIBBITS.

COURT FOR CROWN CASES RESERVED. 1901.

[*Reported* 1902, 1 *K. B.* 77.]

LORD ALVERSTON, C. J.[2] This was a case reserved by Kennedy, J., at the last summer assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The indictments contained sixteen counts, upon each of which the defendants were found guilty. The charges contained in the indictment related to the publication of certain matters in a newspaper called the *Weekly Dispatch*, between January 13, 1901, and March 4, 1901 (inclusive), and particularly to the issues of that newspaper dated respectively January 13 and February 3, 1901. Prior to the publication of the first article, two persons, named Allport and Chappell, had been charged before the magistrate with offences under the Prevention of Cruelty to Children Act, 1894. Further charges of attempting to murder, and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy to commit the offence against s. 1 of the Prevention of Cruelty to Children Act, 1894, were preferred against them. On February 8 Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on February 20. Their trial on the indictment for the attempt to murder commenced before Day, J., on March 1, and terminated on March 5. They were found guilty, and sentenced, Allport to fifteen years' penal servitude and Chappel to five years' penal servitude. The publications in the *Weekly Dispatch*, which formed the subject of the present indictment against Tibbits and Windust, were statements relating to the case of Allport and Chappell, contained in the issues of the *Weekly Dispatch* during the hearing of the case against Allport and Chappell before the magistrate, and before and during the trial of these persons at the assizes. It is unnecessary to refer in detail to any of the incriminated articles, of which those of January 13 and February 3 were the most important. It is sufficient to say that the publication went far beyond any fair and *bona fide* report of the proceedings before the magistrate. They contained, couched in a florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Many of these statements related to matters as to which evidence could not have been admissible against them in any event, and purported to be the result of investigations made by the "Special Crime Investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants on all the counts of the indictment. Upon the argument before us we had no doubt upon the main questions which had been discussed, but, having regard to the nature of the proceedings and the importance of the case, we thought it desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of those points until we have dealt with the main questions of law raised on behalf of both prisoners. It was not attempted to be argued by Mr. Foote, who appeared as counsel for both defendants, that the publication of such articles was lawful, and that the persons publishing such articles could not be punished. On the contrary, he contended that the publication of such articles was a contempt of Court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further urged that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles, that they were calculated to pervert or interfere with the course of justice, was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted. That the publication of such articles constituted a contempt of Court and could be punished as such, is well established. One of the sorts of contempt enumerated by Hardwicke, L. C., in the year 1742, 2 Atk. 471, is prejudicing mankind against persons before the case was heard, and he adds these important words: "There cannot be anything of greater consequence than to keep the realms of justice clear and pure that parties may proceed with safety both to themselves and their characters." The case of Rex *v.* Jolliffe, 4 T. R. 285, shews that a criminal information lay for distributing in the assize town, before the trial at *Nisi Prius*, handbills reflecting on the conduct of a prosecutor, and, in the course of his judgment in that case, Lord Kenyon made the following very relevant observations, 4 T. R. at p. 298: "Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but that is a minor offence, when compared with that of publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But, if an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And, therefore, I cannot forbear saying, that, if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity." Again, in the case of Rex *v.* Fisher, 2 Camp. 563, the printer, publisher, and editor, were convicted for publishing a scandalous, defamatory, and malicious libel, intending to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial, "and to injure and prejudice him in the minds of the liege subjects of our lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the due administration of justice and to deprive the said Richard Stephenson of the benefit of an impartial trial." It was urged on behalf of the defendants that this was an indictment for libel, and that, therefore, it was no authority for the indictment in the present case. But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and we cannot doubt that, if the attempt so to do be made, or means taken, the natural effect of which would be to create a wide-spread prejudice against persons about to take their trial, an offence has been committed, whatever the means adopted, provided there be not some legal justification for the course pursued. The case of Rex *v.* Williams, 2 L. J. (K.B.) (O.S.) 30, is another distinct authority for the same view, in which it was laid down that any attempt whatever to publicly prejudge a criminal case, whether by a detail of the evidence or by a comment, or by a theatrical exhibition is an offence against public justice and a serious misdemeanour. The fair publication of proceedings publicly held in a Court of Justice, if fair and accurate, has now the protection of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3. The law as laid down in the older cases to which we have referred was summarised by Blackburn, J., in Skipworth's Case, L. R. 9 Q. B. 230, at p. 232, and with reference to the objection that the more proper proceeding should be by proceedings for contempt of Court, we would refer to the judgment of the Court in Reg. *v.* Gray, [1900] 2 Q. B. 36, from which it clearly appears that in many cases it is preferable to proceed by information or indictment rather than by motion for contempt. We have no doubt whatever that the publication of the articles in this case, at the time when, and under the circumstances in which they were published, constitutes a criminal offence by whomsoever they were published. We think that the facts, which bring the incriminated articles within the category of misdemeanour, abundantly appear upon the face of each count, and that, under those circumstances, it is perfectly immaterial whether the articles be described and charged as libels or contempts or not. With reference to the argument, which was strongly urged, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see Reg. *v* Grant, 7 St. Tr. (N.S.) 507. We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these, justifies their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a Court of Justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him, the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence.

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[1] Concurring opinions of Williams, Mathew, and Hawkins, J.J., are omitted. — ED.

[2] The opinion only is given: it sufficiently states the case. Part of the opinion is omitted. — ED.

We have now only to consider the special points which were taken on behalf of the defendant Windust. . . .

Conviction Affirmed.

STATE *v.* HOLT.

SUPREME JUDICIAL COURT OF MAINE. 1892.

[Reported 84 Maine, 509.]

WALTON, J. A wilful and corrupt attempt to prevent the attendance of a witness before any lawful tribunal organized for the administration of justice is an indictable offence at common law. The essence of the offence consists in a wilful and corrupt attempt to interfere with and obstruct the administration of justice. And when the act and the motive are first directly averred, and then clearly proved, punishment should follow.

In this case the indictment alleges that the defendant, "well knowing that one Fred N. Treat had been summoned in due form of law to appear before the Supreme Judicial Court holden at Belfast within and for the county of Waldo, on the thirtieth day of April aforesaid, then and there to give evidence in said court in behalf of the State, and contriving and intending to obstruct the due course of justice, did then and there unlawfully and corruptly prevent, and attempt to prevent the said Treat from appearing at said court to give evidence as aforesaid by then and there soliciting, enticing, and persuading the said Treat to become intoxicated, and by then and there removing and abducting him, the said Treat, whereby the said Treat did not appear at said court and give evidence," etc.

It is objected that this indictment is not sufficient, because it does not aver that the witness had been summoned, or that a summons had been issued, or that there was a cause pending requiring the attendance of the witness.

We do not think that either of these objections can be sustained.

In State *v.* Keyes, 8 Vt. 57 (30 Am. Dec. 450), in a well-considered opinion by Mr. Justice Redfield, the court held that it had always been an indictable offence at common law to attempt to prevent the attendance of a witness before a court of justice, although no subpœna for the witness had been served or issued. It will not do for a moment, said the court, to admit that witnesses may be secreted or bribed, or intimidated, and the guilty parties not be liable unless a subpœna has been served upon the witnesses. The doing of any act, continued the court, tending to obstruct the due course of public justice, has always been held to be an indictable offence at common law; and bribing, intimidating, and persuading witnesses, to prevent them from testifying, or to prevent them from attending court, has been among the most common and the most corrupt of this class of offences; and whether the witness has been served with a subpœna, or is about to be served with one, or is about to attend in obedience to a voluntary promise, is not material; for any attempt, in either case, to prevent his attendance, is equally corrupt, equally criminal, and equally deserving of punishment.

In Com. *v.* Reynolds, 14 Gray, 87, the court held it to be an indictable offence at common law to dissuade, hinder, or prevent a witness from attending before a court of justice; and that an indictment for such an offence need not allege in whose behalf the witness had been summoned, nor that his testimony was material. The offence, said Mr. Justice Metcalf, is the obstruction of the due course of justice; and the obstruction of the due course of justice means not only the due conviction and punishment, or the due acquittal and discharge, of an accused party, as justice may require; but it also means the due course of the proceedings in the administration of justice; that, by obstructing these proceedings, public justice is obstructed.

Intentionally and designedly to get a witness drunk, for the express purpose of preventing his attendance before the grand jury, or in open court, is such an interference with the proceedings in the administration of justice as will constitute an indictable offence, and one for which the guilty party ought to be promptly and severely punished. And it is important that it should be understood that the suppression of evidence by such, or by any similarly wicked and corrupt means, cannot be practiced with impunity.

Exceptions overruled. Indictment adjudged sufficient.

STATE *v.* CARVER.

SUPREME COURT OF NEW HAMPSHIRE. 1898.

[*Reported* 69 *N. H.* 216.]

INDICTMENT charging that one Fernald had sold one quart of spirituous liquor contrary to the statute, and that the defendant corruptly and without authority made composition with Fernald and took from him thirty dollars for forbearing to prosecute the supposed offence. The defendant moved to quash the indictment. He also excepted to a ruling of the court at the trial, which is discussed in the opinion.[1]

BLODGETT, J. Whatever diversity of opinion there may justly be as to the policy of the liquor laws of this state, it cannot be doubted that their violation is a grave misdemeanor against public justice, nor that its compromise with the offender by a private individual is both pernicious and illegal.

"Misdemeanors are either *mala in se*, or penal at common law, and such as are *mala prohibita*, or penal by statute. Those *mala in se* are such as mischievously affect the person or property of another, or outrage decency, disturb the peace, injure public morals, or are breaches of public duty." 4 Am. & Eng. Enc. Law 654.

There being in this state no statute prohibiting the composition of misdemeanors, and the body of the common law and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, having been in force here upon the organization of the provincial government and continued in force by the constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature (State *v.* Rollins, 8 N. H. 550; State *v.* Albee, 61 N. H. 427), the first inquiry is whether such composition was an indictable offence at common law.

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[1] This short statement is substituted for that of the Reporter. — ED.

While decisions upon this precise point are lacking, the language of the books is general that the taking of money or other reward to suppress a criminal prosecution, or the evidence necessary to support it, was an indictable offence at common law, and although the English cases may not all be reconcilable with this view, it would seem that when the offence compounded was one against public justice and dangerous to society it was indictable, while those having largely the nature of private injuries, or of very low grade, were not indictable. See Johnson *v.* Ogilby, 3 P. Wms. 277; Fallowes *v.* Taylor, 7 T. R. 475; Collins *v.* Blantern, 2 Wils. 341, 348, 349; Rex *v.* Stone, 4 C. & P. 379; Keir *v.* Leeman, 6 Q. B. 308, 316–322, — S. C., on error. 9 Q. B. 371, 395; Rex *v.* Crisp, 1 B. & Ald. 282; Edgcombe *v.* Rodd, 5 East, 294, 303; Rex *v.* Southerton, 6 East, 126; Beeley *v.* Wingfield, 11 East, 46. 48; Baker *v.* Townsend, 7 Taun. 422, 426; Bushel *v.* Barrett, Ry. & M. 434; Rex *v.* Lawley, 2 Stra. 904; Steph. C. R. L. 67; 3 Wat. Arch. Crim. Pr. & Pl. 623–10, 623–11; 1 Russ. Cr. 136; 1 Ch. Cr. L. (3d Am. ed.) 4; 1 Bish. Cr. L. (7th ed.), *ss.* 710, 711; Dest. Cr. L. *s.* 10 *b*; 4 Wend. Bl. Com. 136, and note 18.

In this restricted sense we are of opinion that the taking of money, or other reward, or promise of reward, to forbear or stifle a criminal prosecution for a misdemeanor, was an indictable offence by the common law, the same as it unquestionably was for a felony (Partridge *v.* Hood, 129 Mass. 403, 405, 406, 407), and that it has always been so understood and received here, as well as in other jurisdictions. Plumer *v.* Smith, 5 N. H. 553, 554; Hinds *v.* Chamberlin, 6 N. H. 229; Severance *v.* Kimball, 8 N. H. 386, 387; Hinesburg *v.* Sumner, 9 Vt. 23, 26; Badger *v.* Williams, 1 D. Chip. 137, 138, 139; State *v.* Keyes, 8 Vt. 57, 65–67; State *v.* Carpenter, 20 Vt. 9; Commonwealth *v.* Pease, 16 Mass. 91; Jones *v.* Rice, 18 Pick. 440; Partridge *v.* Hood, *supra;* State *v.* Dowd, 7 Conn. 384, 386.

Certainly, there is no ground to contend that the offence is any less pernicious and reprehensible under our form of government than under that of the mother country, or that, as a part of the body of the common law, it was inapplicable to our institutions and circumstances at the time of the organization of our provincial government, or in any manner repugnant to the constitution or to our present institutions and circumstances. Indeed, the absence of any statute upon the subject of the composition of misdemeanors sufficiently shows the general understanding in this state, for it cannot reasonably be supposed that so infamous an offence would have been permitted to go unpunished for want of statutory enactment, unless it has been understood generally that under our common law none was necessary.

But not only did the defendant, in consideration of a reward, compound a public misdemeanor, and suppress and destroy the material evidence necessary to support it, he also defrauded the revenue by depriving the public of that portion of the pecuniary penalty to which they are entitled for a violation of the liquor laws; and this of itself is a sufficient ground on which to sustain an indictment at common law. Rex *v.* Southerton, 6 East, 126; 1 Russ. Cr. 134.

In view of these conclusions, it is unnecessary to examine the question argued by counsel as to whether or not the case falls within the statute of 18 Eliz., *c.* 5 (made perpetual by 27 Eliz., *c.* 10, and amended as to punishment by 56 Geo. III, *c.* 138), by which it was enacted that if any person "by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or consent of some court, "he shall stand two hours in the pillory, be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds."

The motion to quash the indictment because it describes the offence for which composition was made as a "supposed offence," was properly denied. "The bargain and acceptance of the reward makes the crime" (State *v.* Duhammel, 2 Harr. 532, 533); and in such a case, "the party may be convicted though no offence liable to a penalty has been committed by the person from whom the reward is taken." Reg. *v.* Best, 9 C. & P. 368, — 38 Eng. C. L. 220; Rex *v.* Gotley, Russ & Ry. 84; People *v.* Buckland, 13 Wend. 502; 1 Russ. Cr. 133, 134; 3 Arch. Crim. Pr. & Pl. 623–11.

The ruling that "if the defendant knew what he was doing and did what he intended to do, it was immaterial what his opinion was as to the legal effect of what he was doing, and it would be no defence that he did not know he was violating the law," was manifestly correct. "A man's moral perceptions may be so perverted as to imagine an act to be right and legal which the law justly pronounces fraudulent and corrupt; but he is not therefore to escape from the consequences of it." Bump. Fr. Conv. (3d ed.) 25. "Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law" (Reynolds *v.* United States, 98 U. S. 145); and "in no case can one enter a court of justice to which he has been summoned in either a civil or criminal proceeding, with the sole and naked defence that when he did the act complained of, he did not know of the existence of the law which he violated." 1 Bish. Cr. L. (7th ed.), *s.* 294.

It is elementary, as well as indispensable to the orderly administration of justice, that every man is presumed to know the laws of the country in which he dwells. and also to intend the necessary and legitimate consequences of what he knowingly does. If there are cases in which the application of these presumptions might operate harshly, the admitted facts amply demonstrate that this case is not such an one. *Exceptions overruled.*

REX *v.* BLAKE.

KING'S BENCH. 1765.

[*Reported* 3 *Burrow,* 1731.]

MR. *Dunning* showed cause why an indictment should not be quashed.

He called it an indictment for a forcible entry; and argued "that an indictment for a forcible entry may be maintained at common law." He cited a case in Trin. 1753, 26, 27, G. 2. B. R. Rex *v.* Brown and Others; and Rex *v.* Bathurst, Tr. 1755, 28 G. 2. S. P.

But, N. B. This indictment at present in question was only for (*vi et armis*) breaking and entering a close (not a dwelling-house) and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession.

Mr. *Popham*, on behalf of the defendants, objected "that this was an indictment for a mere trespass, for a civil injury; not a public, but a private one; a mere entry into his close, and keeping him out of it." The "force and arms" is applied only to the entry, not to the expelling or keeping out of possession; they are only charged to be unlawfully and unjustly. This is no other force than the law implies. No actual breach of the peace is stated; or any riot; or unlawful assembly. And he cited the cases of Rex *v.* Gask, Rex *v.* Hide, and Rex *v.* Hide and Another (which, together with a note upon them, may be seen in the text and margin of page 1768).

Rex *v.* Bathurst is the only case where the objection has not been held fatal; and that was because it was a forcible entry into a dwelling-house.

Rex *v.* Jopson *et al.* Tr. 24, 25 G. 2 B. R. was an unlawful assembly of a great number of people. (V. *ante* 3 Burr. 1702, in the margin.)

Mr. Justice WILMOT. No doubt, an indictment will lie at common law for a forcible entry, though they are generally brought on the acts of parliament. On the acts of parliament, it is necessary to state the nature of the estate, because there must be restitution; but they may be brought at common law.

Here the words "force and arms" are not applied to the whole; but if they were applied to the whole, yet it ought to be such an actual force as implies a breach of the peace, and makes an indictable offence. And this I take to be the rule, "That it ought to appear upon the face of the indictment to be an indictable offence."

Here indeed are sixteen defendants. But the number of the defendants makes no difference, in itself; no riot, or unlawful assembly, or anything of that kind is charged. It ought to amount to an actual breach of the peace indictable, in order to support an indictment. For, otherwise, it is only a matter of civil complaint. And this ought to appear upon the face of the indictment.

Mr. Justice YATES concurred. Here is no force or violence shown upon the face of the indictment, to make it appear to be an actual force indictable; nor is any riot charged, or any unlawful assembly. Therefore the mere number makes no difference.

Mr. Justice ASTON concurred; the true rule is, "That it ought to appear upon the face of the indictment to be an indictable offence."

PER CUR. unanimously.

Rule made absolute to quash this indictment.[1]

COMMONWEALTH v. GIBNEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 2 *Allen*, 150.]

INDICTMENT, charging that the defendants, five in number, "together with divers others, to the number of twelve and more, to the jurors aforesaid unknown, being evil disposed and riotous persons, and disturbers of the peace of said commonwealth, on the thirty-first day ot December in the year of our Lord one thousand eight hundred and sixty, at North Andover, in the county of Essex aforesaid, with force and arms, to wit, with clubs, staves, stones, and other dangerous and offensive weapons, a certain building there situate, called the Union Hall, the property of one Thomas E. Foy, in the night time, unlawfully, riotously, and routously did attack and beset, and did then and there unlawfully, riotously, routously, and outrageously make a great noise, disturbance, and affray near to and about the said building, and did unlawfully, riotously, and routously continue near to and about and in the said building, making such noise, disturbance, and affray for a long space of time, to wit, for the space of one hour, and the doors and windows of the said building did then and there unlawfully, riotously, and routously, with the dangerous and offensive weapons aforesaid, break, destroy, and demolish, to the great damage of the said Thomas E. Foy, to the great terror of divers good people of said commonwealth then and there lawfully being, against the peace," etc.

After a verdict of guilty in the superior court, Peter Gibney, one of the defendants, moved in arrest of judgment for reasons indicated in the opinion; but the motion was overruled by Morton, J., and the defendant alleged exceptions.

DEWEY, J. It was held as early as Regina v. Soley, 2 Salk. 594, that judgment should be arrested and the indictment held bad, "because it is not said that the defendants unlawfully assembled." The proposition thus stated seems to be held as correct in the later elementary writers. To maintain an indictment for a riot, it is said in Archb. Crim. Pr. 589, that the prosecutor must prove: 1. The assembling; 2. The intent, namely, "that they so assembled together with intent to execute some enterprise of a private nature, and also mutually to assist one another against any person who should oppose them in doing so. The intent is proved in this, as in every other case, by proving facts from which the jury may fairly presume it." The definition of a riot includes the statement "of three persons or more assembling together." 1 Russell on Crimes, 266. In 2 Deacon's Crim. Law, 1113, a riot is said to be "a tumultuous meeting of three or more persons, who actually do an unlawful act of violence, either with or without a common cause or quarrel;" "or even do a lawful act, as removing a nuisance in a violent and tumultuous manner."

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[1] See Rex v. Storr, 3 Burr. 1698; Rex v. Wilson, 8 T. R. 357; Com. v. Shattuck, 4 Cush. (Mass.) 141; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Edwards 1 Ashm. (Pa.) 46. See State v. Burroughs, 7 N. J. L. 426 Com. v. Powell, 8 Leigh (Va.) 719.

The distinction in criminal treatises, in the definitions of riots, routs, and unlawful assemblies, assumes that there must be an assembling together, and an unlawful assembly; although the assembly may not have been unlawful on the first coming together of the parties, but becomes so by their engaging in a common cause, to be accomplished with violence and in a tumultuous manner. And the precedents for indictments for a riot, with the exception of a single one in Davis's Precedents, the others in that book being different, all allege an unlawful assembling together. This seems to be a necessary form in a proper indictment for a riot, although the proof of such unlawful assembly may be made by showing three or more persons acting in concert in a riotous manner, as to using violence, exciting fear, etc.

The present indictment cannot therefore be sustained as a good indictment for a riot, for want of proper allegations of the assembling together of three or more persons.

It cannot be sustained as an indictment for forcible entry, the allegations not being adapted to a charge of that offence.

It cannot be sustained as an indictment for malicious mischief, for the like reason. Nor can it be maintained as a charge at common law for a disturbance of the peace. A man cannot be indicted for a mere trespass. No indictment lies at common law for mere trespass committed to land or goods, unless there be a riot or forcible entry. The King *v.* Wilson, 8 T. R. 357. The words "violently and routously," here used, have no particular pertinency, except as terms appropriate to a formal indictment for riot, charging also an unlawful assembly. In the present indictment there is nothing more alleged than a trespass, with violence. There is no allegation that any person was in the building, but only of a breaking of doors and windows of a building, which might be a mere trespass.

If the case was a proper one for an indictment for a riot, as it probably was, that offence not being properly charged, the indictment is bad, and the motion in arrest of judgment must prevail.

Judgment arrested.

RESPUBLICA *v.* TEISCHER.

SUPREME COURT OF PENNSYLVANIA. 1788.

[*Reported* 1 *Dallas*, 335.]

THE defendant had been convicted in the county of Berks upon an indictment for maliciously, wilfully, and wickedly killing a horse; and upon a motion in arrest of judgment, it came on to be argued whether the offence, so laid, was indictable.

Sergeant, in support of the motion, contended that this was an injury of a private nature, amounting to nothing more than a trespass; and that to bring the case within the general rule of indictments for the protection of society, it was essential that the injury should be stated to have been perpetrated secretly as well as maliciously, — which last he said was a word of mere form, and capable of an indefinite application to every kind of mischief. To show the leading distinction between trespasses for which there is a private remedy and crimes for which there is a public prosecution, he cited Hawk. Pl. Cr. 210, lib. 2, c. 22, s. 4; and he contended that the principle of several cases, in which it was determined an indictment would not lie, applied to the case before the court. 2 Stra. 793; 1 Stra. 679.

The *Attorney-General* observed, in reply, that though he had not been able to discover any instance of an indictment at common law for killing an animal, or, indeed, for any other species of malicious mischief, yet that the reason of this was probably the early interference of the statute law to punish offences of such enormity; for that in all the precedents, as well ancient as modern, he had found the charge laid *contra formam statuti*, except in the case of an information for killing a dog, — upon which, however, he did not mean to rely. 10 Mod. 337.

He said that the law proceeded upon principle, and not merely upon precedent. In the case of Wade, for embezzling the public money, no precedent was produced; and one Henry Shallcross was lately condemned in Montgomery County for maliciously burning a barn (not having hay or corn in it), though there was certainly no statute for punishing an offence of that description in Pennsylvania. The principle, therefore, is that every act of a public evil example and against good morals is an offence indictable by the common law; and this principle affects the killing of a horse, as much, at least, as the burning of an empty barn.

But he contended that there were many private wrongs which were punishable by public prosecution; and that with respect to these a distinction had been accurately established in 2 Burr. 1129, where it is said that "in such impositions or deceits where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable." — Accordingly, in Crown Circ. Comp. 231; 1 Stra. 595; S. C. Crown Circ. Comp. 24, are cases of private wrongs, and yet punished by indictment; because, as it is said in Burrow, common prudence could not have guarded the persons against the injury and inconveniency which they respectively sustained. The same reason must have prevailed in an indictment at Lancaster (the draft of which remains in the precedent book of the successive attorneys-general of this State) for poisoning bread, and giving it to some chickens; and it applies in full force to the case before the court.

Independent, however, of these authorities and principles, the jury have found the killing to be something more than a trespass; and that it was done maliciously forms the gist of the indictment; which must be proved by the prosecutor, and might have been controverted and denied by the defendant. Being therefore charged, and found by the verdict, it was more than form; it was matter of substance.

The opinion of the court was delivered, on the 15th of July, by the Chief Justice.

M'Kean, C. J. The defendant was indicted for "maliciously, wilfully, and wickedly killing a horse;" and being convicted by the jury, it has been urged, in arrest of judgment, that this offence was not of an indictable nature.

It is true that on the examination of the cases we have not found the line accurately drawn; but it seems to be agreed that whatever amounts to a public wrong may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offences of a similar description, have heretofore been indicted in Pennsylvania; and 12 Mod. 337, furnishes the case of an indictment for killing a dog, — an animal of far less value than a horse. Breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot, and the embezzlement of public moneys, have, likewise, in this State been deemed public wrongs, for which the private sufferer was not alone entitled to redress; and unless, indeed, an indictment would lie, there are some very heinous offences which might be perpetrated with absolute impunity; since the rules of evidence, in a civil suit, exclude the testimony of the party injured, though the nature of the transaction generally makes it impossible to produce any other proof.

For these reasons, therefore, and for many others which it is unnecessary to recapitulate, as we entertain no doubt upon the subject, we think, the indictment will lie.

Let judgment be entered for the Commonwealth.[1]

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[1] See U. S. v. Gideon 1 Minn. 292; State v. Beekman, 3 Dutch (N. J.) 124; Loomis v. Edgerton, 19 Wend. (N. Y.) 419; State v. Phipps, 10 Ire. (N. C.) 17.

COMMONWEALTH *v.* TAYLOR.

SUPREME COURT OF PENNSYLVANIA. 1812.

[*Reported* 5 *Binney* 277.]

THE defendant was indicted in the Quarter Sessions of Franklin county for "that he, on the 24th of August 1809, about the hour of ten of the clock *in the night* of the same day, *with force and arms* at Lurgan township, in the county aforesaid, the dwelling house of James Strain there situate, unlawfully, maliciously, and *secretly* did break and enter, with intent to disturb the peace of the commonwealth; and so being in the said dwelling house, unlawfully, vehemently, and turbulently *did make a great noise*, in disturbance of the peace of the commonwealth and greatly misbehave himself, in the said dwelling house; and Elizabeth Strain, the wife of the said James, greatly did frighten and alarm, by means of which said fright and alarm she the said Elizabeth, being then and there pregnant, did on the 7th day of September in the year aforesaid at the county aforesaid miscarry, and other wrongs to the said Elizabeth then and there did, to the evil example, &c."

The jury having found the defendant guilty, the Quarter Sessions arrested the judgment upon the ground that the offence charged was not indictable; and the record was brought up to this Court by writ of error.

TILGHMAM, C. J. It is contended on the part of James Taylor, that the matter charged in the indictment is no more than a private trespass, and not an offence subject to a criminal prosecution. On the other hand it has been urged for the commonwealth that the offence is indictable; 1st, as a forcible entry,— 2d, as a malicious mischief.

1. I incline to the opinion that the matter charged in the indictment does not constitute a forcible entry, although no doubt a forcible entry is indictable at common law. There must be actual force to make an indictable offence. The bare allegation of its being done with force and arms, does not seem to be sufficient; for every trespass is said to be with force and arms. In the King *v.* Storr, 3 Burr. 1698, the indictment was for unlawfully entering his yard and digging the ground and erecting a shed, and unlawfully and with force and arms putting out and expelling one Mr. Sweet the owner from the possession, and keeping him out of the possession. This indictment was quashed. The King *v.* Bake and fifteen others, 3 Burr. 1731, was an indictment for breaking and entering with force and arms a close (not a dwelling house), and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession. This also was quashed, and the rule laid down by all the court was that there must be force or violence shewn upon the face of the indictment, or some riot or unlawful assembly. It appears indeed that in the King *v.* Bathurst, cited and re-

marked by the judges in the King *v.* Storr, the court laid considerable stress on the circumstance of entering a dwelling house. We have no report of that case, but Lord Mansfield's observation on it (3 Burr. 1701) is that it does not seem to him to lay down any such rule as that force and arms alone implies such force as will of itself support an indictment. "There," says he, "the fact itself naturally implied force; it was turning and keeping the man out of his dwelling house, and done by three people." In the case before us, there is the less reason to suppose actual force, as the entry is charged to have been made secretly. This might have been done through a door which was open, and yet in point of law, it was a breaking and entry with force and arms, which is the allegation in every action of trespass.

2. But supposing the indictment not to be good for a forcible entry, may it not be supported on other grounds? In the case of the Commonwealth *v.* Teischer, 1 Dall. 335, judgment was given against the defendant for "maliciously, wilfully and wickedly killing a horse." These are the words of the indictment, and it seems to have been conceded by Mr. Sergeant, the counsel for the defendant, that if it had been laid to be done secretly, the indictment would have been good. Here the entering of the house is laid to be done "secretly, maliciously, and with an attempt to disturb the peace of the commonwealth. I do not find any precise line by which indictments for malicious mischief are separated from actions of trespass. But whether the malice, the mischief, or the evil example is considered, the case before us seems full as strong as Teischer's case. There is another principle, however, upon which it appears to me that the indictment may be supported. It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a deceased person is an offence against the public, because it may stir up the passions of the living and produce acts of revenge. Now what could be more likely to produce violent passion and a disturbance of the peace of society, than the conduct of the defendant? He enters secretly after night into a private dwelling house, with an intent to disturb the family, and after entering makes such a noise as to terrify the mistress of the house to such a degree as to cause a miscarriage. Was not this enough to produce some act of desperate violence on the part of the master or servants of the family? It is objected that the kind of noise is not described; no matter, it is said to have been made vehemently and turbulently, and its effects on the pregnant woman are described. In the case of the King *v.* Hood (Sayers' Rep. in K. B. 161) the court refused to quash an indictment for disturbing a family by violently knocking at the front door of the house for the space of two hours. It is impossible to find precedents for all offences.

The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbours. To this invention must be opposed general principles, calculated to meet and punish them. I am of opinion that the conduct of the defendant falls within the range of established principles, and that the judgment of the Court below should be reversed.

BRACKENRIDGE, J. It cannot be inferred, *vi termini*, that the word "break" means more than a *clausum fregit*, or a breaking of the close in contemplation of law, even though a dwelling house was the close broken; because the trespass might be by walking into it, the door open. But the court might refuse to quash, because it might appear on the evidence that the breaking amounted to more than a *clausum fregit* in trespass. But taking the entry to amount to nothing more than a walking in, the door open, may not the motive of his entry, and the use he made of it, constitute a misdemeanor? What is he alleged to have done, after entering the house? "Wilfully, vehemently, and turbulently did make a great noise." How is a noise occasioned that is perceptible to the ear? It must be by an impulse of the air on the organs of hearing. And what is it, whether it is by the medium of air, or water, or earth, that an assault and battery is committed? The impulse of the air may give a great shock. Birds have fallen from the atmosphere struck by a mighty voice. This happened at the celebration of the Isthmian games, as related by Plutarch in his life of Paulus Emilius. Are we bound to consider the noise gentle? Are we not at liberty to infer the mightiest effort of the human lungs? But the power of imagination increases the effect. Armies have been put to rout by a shout. The king of Prussia in the seven years' war won a battle by the sound of artillery without ball. Individuals have been thrown into convulsions by a sudden fright from a shout. The infant in the womb of a pregnant woman has been impressed with a physical effect upon the body, and even upon the mind, by a fright. Mary, queen of Scots, from the assassination of Rizzio, communicated to her offspring the impression of fear at the sight of a drawn sword. Peter the Great of Russia had a dread of embarking on water from the same cause. Shall we wonder then that death is occasioned to the embryo, in the womb of a pregnant woman, by a sudden fright? If in this indictment it had been stated that the woman was pregnant with a living child, it might have been homicide. But she is stated to have miscarried, which is the parting with a child in the course of gestation. Will not the act of the individual maliciously occasioning this, constitute a misdemeanor? A sudden fright even by an entry without noise, presenting the appearance of a spectre, might occasion this, even though in playful frolic; yet after such effect, would not the law impute malice? No person has a right to trifle in that manner to the injury of another.[1]

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[1] Part of the opinion of Brackenridge, J., and the concurring opinion of Yeates, J., are omitted. See State *v.* Huntley, 3 Ire. (N. C.) 418; State *v.* Tolever, 5 Ire. (N. C.) 452; Penns *v.* Cribs, Add. (Pa.) 277; Henderson *v.* Com., 8 Gratt. (Va) 708.

REGINA *v.* ADAMS.

COURT FOR CROWN CASES RESERVED. 1888.

[*Reported* 22 *Q. B. D.* 66.]

CASE stated by the Recorder of London for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the sessions of the Central Criminal Court. held on September 17, 1888, J. C. Adams was tried on an indictment which charged him, in the third count, with having, on June 19, 1888, unlawfully, wickedly, and maliciously written and published to E. S. Y., the younger, who was a good, peaceable, virtuous, and worthy subject of our Lady the Queen, in the form of a letter directed to her, the said E. S. Y., the said letter containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said E. S. Y., and of and concerning the character for virtue, modesty, and morality then borne by the said E. S. Y. [the letter was set out], to the great damage, scandal, infamy, and disgrace of the said E. S. Y., to the evil example, etc., and against the peace, etc.[1]

At the close of the case for the prosecution counsel for the prisoner submitted that there was no case to go to the jury, on the grounds (*inter alia*) that to write and send to a person letters in the form of those set out in the indictment was not an indictable offence; that the letter set out in the third count was neither a defamatory libel nor an obscene libel; and that there had been no publication of it.

The recorder declined to stop the case upon the objections taken, but left it to the jury, who convicted the prisoner on all the counts of the indictment.

The recorder thereupon respited judgment and admitted the prisoner to bail.

The question for the opinion of the Court was whether, upon the facts stated, the prisoner could properly be convicted on all or any of the counts of the indictment.

LORD COLERIDGE, C. J. It is unnecessary to discuss some of the important questions which have been raised in this case. Upon those questions, therefore, I, and I believe the other members of the Court, desire to give no opinion. It appears to me that there is a very short and plain ground upon which this conviction can be sustained. It is a conviction upon an indictment, the third count of which charges that the letter there set out is a defamatory libel, tending to defame and bring into contempt the character of the person to whom it was sent. I am of the opinion that the letter is of such a character as that it tended to provoke a breach of the peace. At all events, the sending of such a letter to the person to whom it was sent might, under the circumstances of her position and character, reasonably or probably tend to provoke a breach of the peace on her part, or on the part of those connected with her. The jury must be taken to have found that it was a defamatory libel which was calculated to provoke a breach of the peace; and on that short ground I am of opinion that the conviction must be affirmed on the third count of the indictment.

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[1] The evidence is omitted. — ED.

MANISTY, HAWKINS, DAY, and A. L. SMITH, JJ., concurred.

Conviction affirmed.[1]

REX v. HATHAWAY.

KING'S BENCH. 1701.

[*Reported* 12 *Mod.* 556.]

ONE Hathaway, a most notorious rogue, feigned himself bewitched and deprived of his sight, and pretended to have fasted nine weeks together; and continuing, as he pretended, under this evil influence, he was advised, in order to discover the person supposed to have bewitched him, to boil his own water in a glass bottle till the bottle should break, and the first that came into the house after should be the witch; and that if he scratched the body of that person till he fetched blood, it would cure him; which being done, and a poor old woman coming by chance into the house, she was seized on as the witch and obliged to submit to be scratched till the blood came; whereupon the fellow pretended to find present ease. The poor woman hereupon was indicted for witchcraft, and tried and acquitted at Surrey assizes before Holt, C. J., a man of no great faith in these things; and the fellow persisting in his wicked contrivance, pretended still to be ill, and the poor woman, notwithstanding the acquittal, forced by the mob to suffer herself to be scratched by him. And this being discovered to be all imposition, an information was filed against him.

COMMONWEALTH v. WING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1829.

[*Reported* 9 *Pickering*, 1.]

THE defendant was indicted for maliciously discharging a gun, whereby a woman, named M. A. Gifford, was thrown into convulsions and cramps. It was averred that the defendant well knew that she was subject to such convulsions and cramps upon the firing of a gun, and that at the time when the offence was committed, he was warned and requested not to fire.

The case was tried before WILDE, J.

It was proved that M. A. Gifford was severely affected with a nervous disorder, and that she was uniformly thrown into a fit upon hearing a gun, thunder, or any other sudden noise, or by hearing the words "gun, ammunition," &c. mentioned. It was also proved that she had been in this situation for more than six years.

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[1] See State v. Roberts, 2 Marv. (Del.) 450; Com. v. Chapman, 13 Met. (Mass.) 68. Compare Rex v. Freake, Comb. 13; Reg. v. Taylor, 2 Ld. Raym. 879; State v. Edens, 95 N. C. 693.

It was further proved that the defendant discharged the gun in a highway, for the purpose of killing a wild goose, at a place two or three rods from the house in which M. A. Gifford then lived; which house was situated on a neck of land where citizens had from time immemorial resorted for the purpose of fowling. And it was also proved that immediately before the defendant discharged his gun, he was requested by M. A. Gifford's father not to fire, as it would throw his daughter into fits; and evidence also was introduced showing the defendant's previous knowledge of the effect produced on her by the report of a gun, especially when discharged near to her.

The defendant contended that as he was engaged in a lawful occupation, and as M. A. Gifford had for so long a time been afflicted with what had probably become an incurable disease, he was not liable to punishment for the commission of the act alleged in the indictment.

The judge instructed the jury that if they believed that the defendant knew, or had good reason to believe, that the consequences above mentioned would be produced by the firing of the gun, and had notice to that effect immediately before the firing, they should return a verdict of guilty; which they did accordingly. If this instruction was wrong, a new trial was to be granted.

Warren for the defendant. The indictment is for an alleged offence, which is technically called a nuisance. It cannot be sustained, because the act done was not to the annoyance of the citizens generally. Bac. Abr. Nuisance B; Rex *v.* White, 1 Burr. 333; Rex *v.* Combrune, 1 Wils. 301; Rex *v.* Wheatly, 2 Burr. 1126; Rex *v.* Lloyd, 4 Esp. 200; Arnold *v.* Jefferson, 3 Salk. 248. The act, in itself, was neither *malum in se* nor *malum prohibitum*. The defendant was in the exercise of a lawful employment, and the injury was to a single person. Her remedy is by action; the Commonwealth is not interested in the matter. The dictum of Sewall, C. J., in Cole *v.* Fisher, 11 Mass. R. 139, — that where the discharge of a gun is unnecessary, a matter of idle sport and negligence, and still more where it is accompanied with purposes of wanton and deliberate mischief, the party is liable as a public offender, — does not apply to this case; for the act of the defendant does not come within either of those descriptions, and it was not done to the common danger of the citizens, but on a neck of land where citizens had immemorially resorted for the purpose of fowling.

The nature of the disease is such that a citizen was not obliged, from regard to it, to refrain from his usual lawful pursuits. Where a person is suffering under a complaint which is aggravated by the transaction of the ordinary business of society, it is better that he should suffer than that the business of the community should be suspended. It is certainly better that he should be left to that remedy which the law gives every man for a violation of his private rights. If the above doctrine is not sound as applied to temporary diseases, it is when the affection is of so long standing as in this case. An action cannot be sustained for an injury which the party might have avoided by ordinary care. It was the duty of the woman to have removed from a neighborhood where the citizens have immemorially pursued an occupation which injuriously affected her health. Butterfield *v.* Forrester, 11 East, 60; Smith *v.* Smith, 2 Pick. 621; Rex *v.* Cross, 2 Carr. & Payne, 483.

Morton, Attorney-General, *contra*, cited 4 Bl. Com. 197; and Cole *v.* Fisher, 11 Mass. R. 139.

PARKER, C. J., delivered the opinion of the court. If the indictment were for a nuisance, the authorities cited by the defendant's counsel would clearly show that it could not be sustained; for the most that could be made of it would be a private nuisance, for which an action on the case only would lie. But we think the offence described is a misdemeanor, and not a nuisance. It was a wanton act of mischief, necessarily injurious to the person aggrieved, after full notice of the consequences, and a request to desist. The jury have found that the act was maliciously done.

In the case of Cole *v.* Fisher, 11 Mass. R. 137, Chief Justice Sewall, in delivering the opinion of the court, speaking of the discharging of guns unnecessarily, says, if it is a matter of idle sport and negligence, and still more when the act is accompanied with purposes of wanton or deliberate mischief, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security, is liable to be indicted, &c.

Now the facts proved in the case, namely, the defendant's previous knowledge that the woman was so affected by the report of a gun as to be thrown into fits, the knowledge he had that she was within hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety and even the life of the afflicted party, as makes the firing a wanton and deliberate act of mischief.

Judgment on the verdict.[1]

REX *v.* MAUD.

BEDFORDSHIRE EYRE. 1202.

[*Reported* 1 *Selden Soc.* 27.]

MAUD, wife of Hugh, was taken with a false gallon with which she sold beer, so that the keepers of the measures testify that they took her selling beer with it. And since she cannot defend this, it is considered that she be in mercy. She made fine with two marks.

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[1] But see Rogers *v.* Elliott, 146 Mass. 349. Compare State *v.* Buckman, 8 N. H. 203; People *v.* Blake, 1 Wheel. (N. Y.) 490. For other kinds of personal injury, see State *v.* Cooper, 2 Zab. (N. J.) 52; State *v.* Slagle, 82 N. C. 653; Reg. *v.* Hogan, 2 Den. C. C. 277; Com. *v.* Stoddard, 9 All. (Mass.) 280; Rex *v.* Treeve, 2 East P. C 821; State *v.* Smith, 3 Hawks (N. C.) 378.

ANONYMOUS.

COMMON BENCH. 1309.

[*Reported Year Book*, 2 & 3 *Edw.* II (*Seld. Soc.*) 120.]

A MAN was sued by the commonalty of the town of London for a trespass against the statute of forestallers (made) in the Guildhall, and (the plaintiffs) said that, whereas all the citizens of London came for their merchandise and foreign folk came with their merchandise to the city, to wit, with beasts, sheep, and poultry, etc., without which the city cannot be sustained, this man is a common forestaller of all the things aforesaid, so that when he has bought them for a certain sum he will sell them for double, wrongfully and against the common ordinance, and to their damage, etc.

Passeley for the defendant: We do not believe that you have warrant to try this plaint, for this is a matter which should be tried in the eyre, like a charge that a man is a common thief, a common robber, or a common breaker of parks, where no certain deed is laid to his charge. The suit cannot be maintained unless some certain fact be mentioned; for, were it otherwise, every man might have this suit, whereas it belongs to the King and to his crown, which is not to be dismembered. Judgment, whether you can or ought to be received to this plaint.

Therefore it was awarded that they took nothing of their plaint, etc. (and that the commonalty of London be amerced).

REGINA *v.* HANNON.

QUEEN'S BENCH. 1704.

[*Reported* 6 *Mod.* 311.]

HANNON was indicted, for that being a *communis deceptor* of the Queen's people, he came to the wife of B. and made her believe that he had sold part of a ship to her husband, and upon that account got several sums of money from her.

BY THE COURT,

First, "*communis deceptor*" is too general, and so is "*communis oppressor*," "*communis pertubator*," etc. and so of all other (except barretor and scold), without adding of particular instances.

Secondly, The particular instance alledged here is of a private nature; if he had made use of any false token it would have been otherwise.

And the court ordered the indictment to be quashed.

REX *v.* WHEATLY.

KING'S BENCH. 1761.

[*Reported* 2 *Burrow,* 1125.[1]]

DEFENDANT was indicted, for that he, being a common brewer, and intending to deceive and defraud one Richard Webb, delivered to him sixteen gallons, and no more, of amber beer, for and as eighteen gallons, which wanted two gallons of the due measure contracted to be delivered; and received 15*s* for the same; to the evil example, &c., and against the peace, &c. After conviction before Lord MANSFIELD, C. J., at Guildhall, *Morton* moved in arrest of judgment.

Mr. *Morton* and Mr. *Yates*, who were of counsel for the defendant, objected that the fact charged was nothing more than a mere breach of a civil contract, not an indictable offence. To prove this, they cited Rex *v*. Combrun, p. 1751, 24 G. 2 B. R., which was exactly and punctually the same case as the present, only *mutatis mutandis*. And Rex *v*. Driffield, Tr. 1754, 27, 28 G. 2 B. R. S. P. An indictment for a cheat, in selling coals as and for two bushels, whereas it was a peck short of that measure; there the indictment was quashed on motion. Rex *v*. Hannah Heath: An indictment for selling and delivering seventeen gallons, three quarts, and one-half pint of geneva (and the like of brandy) as and for a greater quantity, was quashed on motion.

In 1 Salk. 151., Nehuff's Case, P. 4 Ann. B. R., a *certiorari* was granted to remove the indictment from the Old Bailey; because it was not a matter criminal: it was "borrowing £600 and promising to send a pledge of fine cloth and gold dust, and sending only some coarse cloth, and no gold dust."

In Tremaine, title Indictments for Cheats, all of them either lay a conspiracy or show something amounting to a false token.

A mere civil wrong will not support an indictment. And here is no criminal charge. It is not alleged "that he used false measures." The prosecutor should have examined and seen that it was the right and just quantity.

Mr. *Norton*, *pro rege*, offered the following reasons why the judgment should not be arrested.

The defendant has been convicted of the fact. He may bring a writ of error, if the indictment is erroneous.

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[1] s. c. 1 William Blackstone, 273. The statement of the case is taken from the latter report.

This is an indictable offence; 't is a cheat, a public fraud in the course of his trade, — he is stated to be a brewer. There is a distinction between private frauds and frauds in the course of trade. The same fact may be a ground for a private action, and for an indictment too.

None of the cited cases were after verdict. It might here (for aught that appears to the contrary) have been proved "that he sold this less quantity by false measure;" and everything shall be presumed in favor of a verdict. And here is a false pretence, at the least; and it appeared upon the trial to be a very foul case.

The counsel for the defendant, in reply, said, that nothing can be intended or presumed in a criminal case but *secundum allegata et probata;* it might happen without his own personal knowledge. And they denied any distinction between this being done privately and its being done in the course of trade.

Lord Mansfield. The question is, Whether the fact here alleged be an indictable crime or not. The fact alleged is: —

[Then his Lordship stated the charge, *verbatim.*]

The argument that has been urged by the prosecutor's counsel, from the present case's coming before the court after a verdict, and the cases cited being only of quashing upon motion, before any verdict really turns the other way; because the Court may use a discretion, "whether it be right to quash upon motion or put the defendant to demur;" but after verdict they are obliged to arrest the judgment if they see the charge to be insufficient. And in a criminal charge there is no latitude of intention, to include anything more than is charged; the charge must be explicit enough to support itself.

Here the fact is allowed, but the consequence is denied: the objection is, that the fact is not an offence indictable, though acknowledged to be true as charged.

And that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing; because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; for ordinary care and caution is no guard against this.

Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception. No false weights or measures are used, no false tokens given, no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. 'T is only a non-performance of his contract, for which non-performance he may bring his action.

The selling an unsound horse, as and for a sound one, is not indictable; the buyer should be more upon his guard.

The several cases cited are alone sufficient to prove that the offence here charged is not an indictable offence. But besides these, my brother *Denison* informs me of another case, that has not been mentioned at the bar. It was M. 6 G. 1. B. R. Rex *v.* Wilders, a brewer. He was indicted for a cheat in sending in to Mr. Hicks, an ale-house keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks, assuring him that they did contain that measure, when in fact they did not contain such measure, but so much less, &c. This indictment was quashed on argument, upon a motion, which is a stronger case than the present.

Therefore the law is clearly established and settled; and I think on right grounds; but on whatever grounds it might have been originally established, yet it ought to be adhered to, after it is established and settled.

Therefore (though I may be sorry for it in the present case, as circumstanced) the judgment must be arrested.

Mr. Just. DENISON concurred with his Lordship.

This is nothing more than an action upon the case turned into an indictment. 'T is a private breach of contract. And if this were to be allowed of, it would alter the course of the law, by making the injured person a witness upon the indictment, which he could not be (for himself) in an action.

Here are no false weights, nor false measures, nor any false token at all, nor any conspiracy.

In the case of the Queen *v.* Maccarty *et al.*, 6 Mod. 301, 2 Ld. Raym. 1179, there were false tokens, or what was considered as such. In the case of the Queen *v.* Jones, 1 Salk. 379, 2 Ld. Raym. 1013, 6 Mod. 105, the defendant had received £20, pretending to be sent by one who did not send him. *Et per Cur.*: "It is not indictable, unless he came with false tokens. We are not to indict one man for making a fool of another; let him bring his action."

If there be false tokens, or a conspiracy, it is another case. The Queen *v.* Maccarty was a conspiracy, as well as false tokens. Rex *v.* Wilders was a much stronger case than this, and was well considered. That was an imposition in the course of his trade, and the man had marked the vessels as containing more gallons than they did really contain, and had written a letter to Mr. Hicks, attesting that they did so.

But the present case is no more than a mere breach of contract: he has not delivered the quantity which he undertook to deliver.

The Court use a discretion in quashing indictments on motion, but they are obliged to arrest judgment when the matter is not indictable. And this matter is not indictable, therefore the judgment ought to be arrested.

Mr. Just. FOSTER. We are obliged to follow settled and established rules already fixed by former determinations in cases of the same kind.

The case of Rex *v.* Wilders was a strong case, — too strong, perhaps, for there were false tokens; the vessels were marked as containing a greater quantity than they really did.

Mr. Just. WILMOT concurred. This matter has been fully settled and established, and upon a reasonable foot. The true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this, — That in such impositions or deceits, where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot, by any ordinary care or prudence, be guarded against, there it is an offence indictable.

In the case of Rex *v.* Pinkney, P. 6 G. 2 B. R., upon an indictment "for selling a sack of corn (at Rippon market) which he falsely affirmed to contain a Winchester bushel, *ubi rerera et infacto plurimum deficiebat, &c.*," the indictment was quashed upon motion.

In the case now before us, the prosecutor might have measured the liquor before he accepted it, and it was his own indolence and negligence if he did not. Therefore common prudence might have guarded him against suffering any inconvenience by the defendant's offering him less than he had contracted for.

This was the case of Rex *v.* Pinkney; and it was there said, That if a shop-keeper who deals in cloth pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer cannot indict him for delivering only six; because he might have measured it, and seen whether it held out as it ought to do, or not. In this case of Rex *v.* Pinkney, and also in the case of Rex *v.* Combrun, a case of Rex *v.* Nicholson, at the sittings before Lord RAYMOND after Michaelmas term, 4 G. 2, was mentioned; which was an indictment for selling six chaldron of coals, which ought to contain thirty-six bushels each, and delivering six bushels short. Lord RAYMOND was so clear in it that he ordered the defendant to be acquitted.

PER CUR. unanimously,

The judgment must be arrested.[1]

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[1] See Rex *v.* Osborn, 3 Burr. 1697; Com. *v.* Warren, 6 Mass. 72. — ED.

SECTION III.

Public Torts.

COMMONWEALTH *v.* ECKERT.

COURT OF QUARTER SESSIONS, PENNSYLVANIA, 1812.

[*Reported* 2 *Browne*, 249.]

THE defendant was indicted for a misdemeanor, in cutting and deadening a black-walnut tree, on the common, or public ground, adjoining the village of Hanover, the property of which was vested in certain trustees, for the use of the inhabitants of said town, by deed from the original owner of the land.

Bowie, for the defendant. It is a rule in morality, as well as in charity, to apply an innocent motive, rather than a malicious one, to have actuated the defendant. A crime or misdemeanor indictable, must be a violation of some known public law. 4 Bl. Com. 5; 1 Hawk. P. C. 366, 7, sect. 1. Act of Assembly against taking off or breaking knockers on doors, spouts, &c., breaking down or destroying signs, &c. Read Dig. 7, Act of 1772. These were offences not indictable at common law; and therefore the necessity of the statute. A number of cases of a private nature are not indictable. 2 Hawk. P. C. 301. Such as breaking closes, &c. 3 Burr. 1698. Cases that apply to individuals or to a parish are not indictable, and there is no difference in this case from that of six, eight, or ten tenants in common of a property; and one of the number cutting a tree, an indictment could not be supported against him that did the act.

PER CURIAM, FRANKLIN, President, to the jury: —

The defendant is charged with a misdemeanor, in cutting and deadening a black-walnut tree, standing on public ground adjoining the town of Hanover, which ground appears to be vested by deed in certain trustees, for the use and benefit of all the inhabitants of said town. This tree was kept and appropriated, by the people of that place, for shade and ornament.

The doctrine on subjects of this kind is well laid down by the late Chief Justice McKean. 1 Dall. 335. Whatever amounts to a public wrong, as killing a horse, poisoning chickens, and the like, is the subject of an indictment for a misdemeanor.

Malice forms the guilt of the indictment. Any evil design, proceeding from a depraved or wicked heart.

If you should consider the tree was useful for public convenience, ornament, and shade (which we think has been fully proved), you may convict the defendant; if not, acquit him.[1] *Verdict, Guilty.*

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[1] See Resp. *v.* Powell, 1 Dall. (Pa.) 47.

REX *v.* RICHARDS.

KING'S BENCH. 1800.

[*Reported* 8 *T. R.* 634.]

THIS was an indictment against the defendants for not repairing a road. The indictment stated that by virtue of an act of parliament, 31 Geo. 3., intitled "an act for draining and dividing a certain moor or tract of waste land called King's sedgmore in the county of Somerset" it was enacted that certain commissioners therein named should before making any allotments of the said moor set out and appoint such private roads and drove-ways over the same as in the judgment of the said commissioners should be necessary and convenient; and that all private roads and ways so to be set out should be made and repaired at the expense of all or any of the persons interested in the said moor and in such manner as the said commissioners should direct; that certain commissioners under the act in execution of the powers thereby vested in them by their award set out and appointed a certain private road and drove-way in over and upon the said moor to be a private road and drove-way to be called Henley Drove-way (describing it); that the said commissioners also awarded that the said drove-way should be for the benefit use and enjoyment of the several owners tenants and occupiers for the time being of all and singular the tenements in the several parishes or hamlets of Highham Lowham Aller Pitney Long Sutton Huish Episcopi Butleigh Ashcott and Greinton in the said county in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the said moor were thereby assigned and allotted unto the same parishes or hamlets respectively; that the said commissioners thereby ordered and directed that the said drove-way should for ever thereafter be repaired by the several owners tenants and occupiers for the time being of all and singular the tenements in the several parishes or hamlets of Highham Lowham Aller Pitney Long Sutton and Huish Episcopi in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the moor were thereby assigned and allotted unto the same parishes or hamlets respectively in equal shares and proportions, when and so often as need should be &c; by reason whereof the said private road and drove-way became and was a private road and drove-way for the purposes above mentioned, and by virtue of the said act and of the said award liable for ever hereafter to be from time to time amended and kept in repair in the manner and by the means aforesaid; that on &c. the said way, called Henley Drove-Way, was ruinous and in decay for want of needful reparation thereof; that J. Richards late of Highham, and the five other defendants, (describing them respectively as of the parishes of Lowham, Aller, Pitney, Long Sutton, and Huish Episcopi) being severally and respectively owners tenants and occupiers of certain tenements in the several parishes or hamlets of Highham Lowham Aller Pitney Long Sutton and Huish Episcopi, in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the said moor were thereby assigned unto the same parishes or hamlets, and being persons interested in the said moor, and by virtue of the premises liable to keep in repair and amend the said drove-way, had not duly repaired and amended the same &c. The defendants pleaded not guilty; and on the trial at the last assizes at Bridgewater before Mr. Justice GROSE the jury found a special verdict.[1] When this case was called on in the paper for argument, The Court asked the prosecutor's counsel on what ground it could be contended that this was an indictable offence, the road in question being only a private road?

Praed, for the prosecutor, answered that this though a private road was set out by virtue of a public act of parliament, under which the defendants were directed to repair it; that consequently the not repairing was a disobedience of a public statute, and therefore the subject of an indictment. That this might be considered to a certain degree as concerning the public; that even "a private act of parliament may be given in evidence without comparing it with the record, if it concern a whole county, as the act of Bedford Levels." 12 Mod. 216. And that there was no other remedy than the present, because it appeared by the special verdict that there were no less than two hundred and fifty persons who were liable to the repair of this road, and that the difficulty of suing so many persons together was almost insuperable.

But the Court interposed, and said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported. That the known rule was that those matters only that concerned the public were the subject of an indictment. That the road in question being described to be a private road did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of it; that each party injured might bring his action against those on whom the duty was thrown. That the circumstance of this road having been set out under a public act of parliament did not make the non-repair of it an indictable offence; that many public acts are passed which regulate private rights, but that it never was conceived that an indictment lay on that account for an infringement of such rights. That here the act was passed for a private purpose, that of dividing and allotting the estates of certain individuals. That even if it were true that there was no remedy by action the consequence would not follow that an indictment could be supported; but that in truth the parties injured had another legal remedy.

Judgment for the defendants.

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[1] The special verdict is omitted. — ED.

COMMONWEALTH *v.* KING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1847.

[*Reported* 13 *Met.* 115.]

THE indictment, in this case, alleged that there was a common and public highway in the town of Sutton, called the Old Central Turnpike, and that the defendant, on the 1st of August 1846, "did unlawfully and injuriously put, place, lay and continue a large quantity of stones, in and upon a part of said highway, to wit, upon a space thereof ten rods long and one rod wide, and the said stones, so placed as aforesaid, he the said Wm. King, from said first day of August, until the finding of this bill, unlawfully and injuriously did keep, continue and maintain, in and upon said highway, whereby the same has been, during all the time aforesaid, and still is, greatly narrowed, obstructed and stopped up," &c. "against the peace," &c. "and contrary to the form of the statute in such case made and provided."[1]

DEWEY, J. . . . The next enquiry is, whether the facts alleged constitute an offence at common law. Upon this point we have no doubt. By the location of a public highway, with certain defined exterior limits, the public acquire an easement coëxtensive with the limits of such highway. Whoever obstructs the full enjoyment of that easement, by making deposits, within such limits of the located highway, of timber, stones or other things, to remain there and occupy a portion of such public highway, is guilty of a nuisance at common law.

It was contended by the counsel for the defendant, that the rights of the public are confined exclusively to the made or travelled road, or to that part which might be safely and properly used for travelling; and that a deposit of timber, stones or other articles, upon a part of the located highway, which, from its want of adaptation to use for travel, could not be thus enjoyed, — as a portion of the way on which there was a high bank, or a deep ravine, — would not subject the party to an indictment for a nuisance upon the highway. This principle is supposed to be sanctioned by the decisions of this court in reference to the rights of travellers, holding that such travellers are to use the travelled or made road, and that if such road is of suitable width, and kept in proper repair, the town may have fully discharged its duty, although it has not made and kept in repair a road of the entire width of the located highway. But there is a manifest distinction between the two cases. In the case supposed, the traveller has all the benefits of a public way secured to him. He only requires a road of proper width, and kept in good repair. But the town, on the other hand, to enable itself to discharge its obligation to the public, requires the full and entire use of the whole located highway. The space between the made road and the exterior limits of the located highway may be required for various purposes; as for making and keeping in repair the travelled path; for making sluices and water-courses; for furnishing earth to raise the road. And, not unfrequently, from the location of the road and from its exposure to be obstructed by snow, the entire width of the located road is required to be kept open, to guard against accumulations of snow that might otherwise wholly obstruct the public travel at such seasons. For these and other uses, in aid of what is the leading object, the keeping in good repair of the made or travelled road, the general easement in the public, acquired by the location of a highway, is coëxtensive with the exterior limits of the located highway; and the question of nuisance or no nuisance does not depend upon the fact, whether that part of the highway, which is alleged to have been unlawfully entered upon and obstructed by the defendant, was a portion of the highway capable of being used by the traveller. Whether it be so or not, an entry upon the located highway, and occupation of any portion of it by deposits of lumber, stones, &c., would be a nuisance, and subject the party to an indictment therefor.[1]

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[1] Only so much of the case as involves the question of a nuisance at common law is given. — ED.

PEOPLE *v.* RUGGLES.

SUPREME COURT OF NEW YORK. 1811.

[*Reported* 8 *Johns.* 290.]

INDICTMENT for blasphemy. After conviction the record was removed to the Supreme Court. *Wendell*, for the prisoner, now contended that the offence charged in the indictment was not punishable by the law of this state, though, he admitted, it was punishable by the common law of England, where Christianity makes part of the law of the land, on account of its connection with the established church.[2]

KENT, C. J. And why should not the language contained in the indictment be still an offence with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for to use the words of one of the greatest oracles of human wisdom, "profane scoffing doth by little and little deface the reverence for religion;" and who adds, in another place, "two principal causes have I ever known of atheism, — curious controversies and profane scoffing." (Lord Bacon's Works, vol. ii, 291, 503.) Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world? No government among any of the polished nations of antiquity, and none of the institutions of modern Europe (a single and monitory case excepted), ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence with the ancient lawgivers and philosophers embraced the religion of the country. *Jurisprudentia est divinarum atque humanarum rerum notitia.* (Dig. b. 1. 10. 2. Cic. De Legibus, b. 2. *passim.*)

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[1] See Hall's Case, 1 Mod. 76; State *v.* Peckard, 5 Harr. (Del.) 500; State *v.* Useful Manufactures Society, 44 N. J. Law 502; People *v.* Cunningham, 1 Den. (N. Y.) 524.

[2] This short statement is substituted for that of the reporter. Only so much of the opinion is given as discusses the argument above advanced. — ED.

The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors. Besides, the offence is *crimen malitiæ*, and the imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown. We are not to be restrained from animadversion upon offences against public decency, like those committed by Sir Charles Sedley (1 Sid. 168), or by one Rollo (Sayer, 158), merely because there may be savage tribes, and perhaps semi-barbarous nations, whose sense of shame would not be affected by what we should consider the most audacious outrages upon decorum. It is sufficient that the common law checks upon words and actions, dangerous to the public welfare, apply to our case, and are suited to the condition of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence, by means of the Christian religion.[1]

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[1] *Acc.* Updegraph *v.* Com., 11 S. & R. (Pa.) 394. — ED.

REGINA *v.* BRADLAUGH.

ASSIZES.

[Reported 15 Cox C. C. 217.]

Lord Coleridge, C. J.[1] . . . . But I have told you that, with regard to these libels, they are, in my judgment, in any view of the law, blasphemous libels. It is not merely that they asperse the doctrine of Christianity; it is not merely that they question particular portions of the Hebrew Scriptures. I should suppose that there are few reasoning, thoughtful men to whom the character of David and the acts of Jehu may not have occasioned considerable question; and to find them represented as approved by an all-pure and all-merciful God may and must have raised very strong doubts. And if these things were argued with due gravity and propriety, I for one would never be a party, unless the law were clear, to saying to any man who put forward his views on those most sacred things, that he should be branded as apparently criminal because he differed from the majority of mankind in his religious views or convictions on the subject of religion. If that were so, we should get into ages and times which, thank God, we do not live in, when people were put to death for opinions and beliefs which now almost all of us believe to be true. It is not a question of that sort at all. It is a question, first of all, whether these things are not in any point of view blasphemous libels, whether they are not calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongt whom we live; and if so, they are not to be tolerated any more than other nuisance is tolerated. We must not do things that are outrageous to the general feeling of propriety among the persons amongst whom we live.

STATE *v.* LINKHAW.

Supreme Court of North Carolina. 1873.

[*Reported* 69 *N. C.* 214.]

Settle, J. The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing, which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his honor who presided at the trial, it appears that at the end of each verse his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied "that he would worship his God, and that as a part of his worship it was his duty to sing." It was further in evidence that the defendant is a strict member of the church, and a man of most exemplary deportment.

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[1] An extract from the charge only is given. — Ed.

"It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services."

This admission by the State puts an end to the prosecution. It is true, as said by his honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the State.

It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the courts.

Venire de novo.[1]

REX v. LYNN.

KING'S BENCH. 1789.

[*Reported Leach* (4*th ed.*), 497.]

LYNN had been convicted of a misdemeanor on an indictment which charged that he, on such a day, had entered a certain burying-ground, and taken from a coffin buried in the earth a dead body for the purpose of dissection.

In Michaelmas Term, 1789, it was moved in the Court of King's Bench in arrest of the judgment, that this was an offence of ecclesiastical cognizance, and not indictable in any court of criminal jurisdiction at the common law. But by THE COURT, the office is cognizable in a criminal court, as highly indecent, and *contra bonos mores;* and the circumstance of its being for the purposes of dissection does not make it a less indictable offence.

The defendant, on the probability of his having committed this crime merely from ignorance, was only fined five marks.[2]

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[1] See State *v.* Jasper, 4 Dev. (N. C.) 323.

[2] See Reg. *v.* Jacobson, 14 Cox, C. C. 522. — ED.

KANAVAN'S CASE.

Supreme Judicial Court of Maine. 1821.

[*Reported* 1 *Greenleaf*, 226.]

The second count stated that the defendant unlawfully and indecently took the body of [a] child and threw it into the river, against common decency, &c.[1]

The defendant being convicted on the second count, a motion was made in arrest of judgment, on the ground that the offence charged was not indictable at common law.

By the Court. We have no doubt upon this subject, and do not hesitate a moment to pronounce the indictment to be good and sufficient, and that there must be sentence against the prisoner.

From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and enclosed as the cemeteries of the dead. Hence, before the late statute of Massachusetts was enacted, it was an offence at common law to dig up the bodies of those who had been buried for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river, it may be cast into a street; if the body of a child, so the body of an adult, male or female. Good morals, decency, our best feelings, the law of the land, — all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to everything connected with the tomb.

Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country; and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit. Our legislature, also, has made it an offence in a civil officer to arrest a dead body by any process in his hands against the party while living; it is an affront to a virtuous and decent public, not to be endured.

It is to be hoped that punishment in this instance will serve to correct any mistaken ideas which may have been entertained as to the nature of such an offence as this of which the prisoner stands convicted.

COMMONWEALTH *v.* SHARPLESS.

SUPREME COURT OF PENNSYLVANIA. 1815.

[*Reported* 2 *Sergeant & Rawle*, 91.]

TILGHMAN, C. J.[1] This is an indictment against Jesse Sharpless and others for exhibiting an indecent picture to divers persons for money. The defendants consented that a verdict should go against them, and afterwards moved in arrest of judgment for several reasons.

1. "That the matter laid in the indictment is not an indictable offence." It was denied, in the first place, that even a public exhibition of an indecent picture was indictable; but supposing it to be so, it was insisted that this indictment contained no charge of a public exhibition. In England there are some acts of immorality, such as adultery, of which the ecclesiastical courts have taken cognizance from very ancient times, and in such cases, although they tended to the corruption of the public morals, the temporal courts have not assumed jurisdiction. This occasioned some uncertainty in the law; some difficulty in discriminating between the offences punishable in the temporal and ecclesiastical courts. Although there was no ground for this distinction in a country like ours, where there was no ecclesiastical jurisdiction, yet the common law principle was supposed to be in force, and to get rid of it punishments were inflicted by act of assembly. There is no act punishing the offence charged against the defendants, and therefore the case must be decided upon the principles of the common law. That actions of public indecency were always indictable, as tending to corrupt the public morals, I can have no doubt; because, even in the profligate reign of Charles II., Sir Charles Sedley was punished by imprisonment and a heavy fine for standing naked in a balcony in a public part of the city of London. It is true that, besides this shameful exhibition, it is mentioned in some of the reports of that case that he threw down bottles containing offensive liquor among the people; but we have the highest authority for saying that the most criminal part of his conduct, and that which principally drew upon him the vengeance of the law, was the exposure of his person. For this I refer to the opinion of the judges in The Queen *v.* Curl, 2 Str. 792; Lord Mansfield, in The King *v.* Sir Francis Blake Delaval, &c., 3 Burr. 1438, and of Blackstone, in the 4th volume of his Commentaries, page 64. Neither is there any doubt that the

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[1] Part of this opinion only is given. YEATES, J., delivered a concurring opinion.

publication of an indecent book is indictable, although it was once doubted by the Court of King's Bench, in The Queen *v.* Reed (in the sixth year of Queen Anne). But the authority of that case was destroyed, upon great consideration, in The King *v.* Curl (1 George II.), 2 Str. 788. The law was in Curl's case established upon true principles. What tended to corrupt society was held to be a breach of the peace and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. Hence it follows that an offence may be punishable if in its nature and by its example it tends to the corruption of morals, although it be not committed in public. In The King *v.* Delaval, &c., there was a conspiracy, and for that reason alone the court had jurisdiction; yet Lord Mansfield expressed his opinion that they would have had jurisdiction from the nature of the offence, which was the seduction of a young woman under the age of twenty-one, and placing her in the situation of a kept mistress, under the pretence of binding her as an apprentice to her keeper; and he cited the opinion of Lord Hardwicke, who ordered an information to be filed against a man who had made a formal assignment of his wife to another person. In support of this we find an indictment in Trem. Pl. 213 (The King *v.* Dingley), for seducing a married woman to elope from her husband. Now, to apply these principles to the present case. The defendants are charged with exhibiting and showing to sundry persons, for money, a lewd, scandalous, and obscene painting. A picture tends to excite lust as strongly as a writing; and the showing of a picture is as much a publication as the selling of a book. Curl was convicted of selling a book. It is true, the indictment charged the act to have been in a public shop, but that can make no difference. The mischief was no greater than if he had taken the purchaser into a private room and sold him the book there. The law is not to be evaded by an artifice of that kind. If the privacy of the room was a protection, all the youth of the city might be corrupted by taking them one by one into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eye of the law this would be a publication, and a most pernicious one. Then, although it is not said in the indictment in express terms that the defendants published the painting, yet the averment is substantially the same, that is to say, that they exhibited it to sundry persons for money; for that in law is a publication.

Motion in arrest of judgment overruled, and judgment on the verdict.[1]

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[1] See Reg. *v.* Grey, 4 F. & F. 73; Reg. *v.* Saunders, 1 Q. B. D. 15; Pike *v.* Com., 2 Duv. (Ky.) 89. — Ed.

REX *v.* DELAVAL.

KING'S BENCH. 1763.

[*Reported* 3 *Burrow,* 1434.]

LORD MANSFIELD now delivered the opinion of the court.[1]

This is a motion for an information against the defendants for a conspiracy to put this young girl (an apprentice to one of them) into the hands of a gentleman of rank and fortune, for the purpose of prostitution; contrary to decency and morality, and without the knowledge or approbation of her father, who prosecutes them for it, and has now cleared himself of all imputation, and appears to be an innocent and an injured man.

A female infant, then about fifteen, was bound apprentice by her father to the defendant Bates, a music-master; the girl appearing to have natural talents for music. The father became bound to the master in the penalty of £200 for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal music; and thereby gained a great profit to Bates, her master. During her apprenticeship, being then about seventeen, she is debauched by Sir Francis Delaval, whilst she resided in the house of Bates' father; as Bates himself was a single man and no housekeeper. In April last, Bates, her master, indirectly assigns her to Sir Francis, as much as it was in his power to assign her over; and this is done, plainly and manifestly, for bad purposes. Bates at the same time releases the penalty to the father, but without the father's application or even privity, and receives the £200 from Sir Francis, by the hands of his tailor, who is employed to pay it to Bates, and also enters into a bond to Bates to secure to him the profits arising from the girl's singing this summer at Marybone. And then she is indentured to Sir Francis Delaval to learn music of him; and she covenants with him, both in the usual covenants of indentures of apprenticeship, and likewise in several others (as "not to quit even his apartments"), etc. These articles between the parties are signed by all but the father, and a bond is drawn from him, in the penalty of £200 for his daughter's performance of these covenants (which he never executed). And the girl goes and lives and still does live with Sir Francis, notoriously, as a kept mistress.

Thus she has been played over, by Bates, into his hands, for this purpose. No man can avoid seeing all this; let him wink ever so much.

I remember a cause in the court of chancery, wherein it appeared that a man had formerly assigned his wife over to another man, and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case.

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[1] Part of the opinion only is given.

It is true that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But if you except those appropriated cases, this court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores;* and upon this ground both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here.

However, besides this, there is, in the present case, a conspiracy and confederacy amongst the defendants, which are clearly and indisputably within the proper jurisdiction of this court.

And in the conspiracy they were all three concerned.

Therefore *let the rule be absolute* against all three.[1]

REGINA *v.* BRANWORTH.

KING'S BENCH. 1704.

[*Reported* 6 *Mod.* 240.]

INDICTMENT by a jury of the town of Portsmouth, "for that he, being an idle person, did wander in the said town selling of small wares as a petit chapman."

To maintain this indictment it was urged that a petit chapman is a vagabond by the statute of 39 Eliz. c. 4.; and though some petit chapmen, that is, such as are legally qualified by the statute of 8 & 9 Will. 3, 25, may now lawfully use that occupation, yet that act excepts boroughs and corporations, so that as to them they remain *in statu quo*.

HOLT, Chief Justice. Is a vagabond *quatenus* such, indictable? It seems not; for at common law a man might go where he would; but if he be an idle and loose person, you may take him up as a vagrant, and bind him to his good behaviour by the common law; and by the Statute of Labourers he may be compelled to serve. There is indeed a way by law of punishing incorrigible rogues, by burning them in the shoulder, and sending them to the gallies; from whence it may be urged, that there must be a way before of convicting them of being rogues, because they cannot otherwise be punished as incorrigible rogues; and therefore that conviction must first be by indictment.

But by HOLT, Chief Justice, No; but by being judged by a justice of peace to be a vagrant, and used by him as such; and if he offend again, he may be indicted as a common vagrant.

Rule for quashing it was enlarged.

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[1] See Reg. *v.* Webb, 1 Den. C. C. 338; Reg. *v.* Elliot, L. & C. 103. — ED.

BAKER *v.* STATE.

SUPREME COURT OF NEW JERSEY. 1890.

[*Reported* 53 *N. J. Law*, 45.]

DIXON, J.[1] The plaintiff in error was convicted in the Camden Quarter Sessions of being a common scold.

One ground on which she seeks a reversal of the judgment is because the indictment does not state the particular facts which make a common scold. But it is not necessary that the indictment should be so explicit. It is enough for it to aver that the accused is a common scold, to the common nuisance, etc. Where the offence consists, not of a single act, but of a habitual course of conduct, an indictment need not charge the details of that conduct, which are only evidence of the misdemeanor, but must charge the general practice which constitutes the crime itself. Hawk., bk. 2, ch. 25, §§ 57, 59; Commonwealth *v.* Pray, 13 Pick. 359, 362; Whart. Cr. Pl. & Pr., § 155.

Another reason urged for reversal is, that the court charged the jury as follows: "The evidence on the part of the state consists of a number of witnesses who have sworn, not that she only scolded one person at one time, but that she did it to several persons on several occasions. Now, if you believe she did that thing, if you believe the evidence on the part of the state, she is guilty of being a common nuisance to the neighborhood in which she resides."

This charge did not correctly point out to the jury the facts required to warrant a conviction, nor submit to their judgment, as it should, the question whether such facts were proved. A woman does not necessarily become a common scold by scolding several persons on several occasions. It is the habit of scolding, resulting in a public nuisance, which is criminal; and whether the scoldings to which the State's witnesses testified were so frequent as to prove the existence of the habit, and whether the habit was indulged under such circumstances as to disturb the public peace, were questions which the jury alone could lawfully decide, and which were no less important than the credibility of witnesses. Brown *v.* State, 20 Vroom 61.[2]

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[1] Part of the opinion is omitted. — ED.

[2] *Acc.* Foxby's Case, 6 Mod. 11; Com. *v.* Mohn, 52 Pa. 243. See State *v.* Davis, 139 N. C. 547.

COMMONWEALTH v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850.

[*Reported* 6 *Cush.* 80.]

THE defendants were tried before MELLEN, J., in the court of common pleas, and convicted, on a complaint originally made to a justice of the peace, in which it was alleged that the defendants, on the 17th of April, 1850, at Grafton, "with force and arms, were disturbers and breakers of the peace, and then and there contriving and intending to disturb the peace of said commonwealth, did, in one of the public streets and other public places of said town, utter loud exclamations and outcries, and other loud noises, and did then and thereby draw together a number of persons, to the great disturbance of divers citizens, in evil example to all others in like cases to offend against good morals, against the peace of said commonwealth, and contrary to the form of the statutes in such case made and provided."

The defendants moved in arrest of judgment, on the ground that no offence was set forth and alleged in the complaint. The motion was overruled, and the defendants excepted.

DEWEY, J. The judgment in this case must be arrested. No offence is technically charged in this complaint. The "disturbance of divers citizens" by noises in the public streets is not a proper setting out of the offence here intended to be charged. If the acts done by the parties constitute any criminal offence, it is that of a nuisance. As such it ought to have been alleged that the noises made by the defendants were to the great damage and common nuisance of all the citizens of the commonwealth there inhabiting, being, and residing, &c.

Judgment arrested.[1]

KING v. PEOPLE.

COURT OF APPEALS OF NEW YORK. 1881.

[*Reported* 83 *N. Y.* 587.]

ANDREWS, J. The indictment charges the plaintiff in error with keeping a disorderly and common bawdy and gambling house, concluding *ad commune nocumentum.* The evidence abundantly sustained the charge, and justified the jury in finding that the defendant kept a house to which gamblers and prostitutes resorted for the purpose of gambling and prostitution.

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[1] See State *v.* Appling, 25 Mo. 315; State *v.* Powell, 70 N. C. 67; Com. *v.* Linn (Pa.) 27 Atl. 843; Com. *v.* Spratt, 14 Phila. (Pa.) 365; Bell *v.* State, 1 Swan (Tenn.) 42.

The court, in the course of the charge, stated to the jury that it was not necessary, to constitute the offence of keeping a disorderly house, that the public should be disturbed by noise, and refused to charge that, in order to convict the defendant of keeping a disorderly house, the jury must find that the house was so kept as to disturb, annoy, and disquiet the neighbors and the people passing and repassing the house. An exception was taken to the charge in this respect and to the refusal to charge as requested.

The exception was not well taken. The keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house and an indictable nuisance at common law. Rex *v.* Dixon, 10 Mod. 335; 1 Hawk. P. C. 693. It is a public offence, for the reason that its direct tendency is to debauch and corrupt the public morals, to encourage idle and dissolute habits and to disturb the public peace. It is not an essential element that it should be so kept that the neighborhood is disturbed by the noise, or that the immoral practices should be open to public observation. The law, it is true, gives a remedy by indictment against those who unduly disturb the quiet of a community by noises which tend to impair the enjoyment of life, but it does not refuse cognizance of those for greater public injuries, which arise from practices which destroy the peace of families and disturb and undermine the foundations of social order and virtue.

The court also charged, that if prostitutes came to the defendant's saloon for the purpose of prostitution, and there consummated their intent, to the knowledge and with the consent of the defendant, the jury should find him guilty. The defendant's counsel excepted, and requested the court to charge that, in order to find the defendant guilty of keeping a bawdy house, the jury must find that he kept his house for the resort and unlawful commerce of lewd people of both sexes. The court said: "I have charged the jury on that subject, and decline to change my charge; I have substantially so charged;" and exception was taken to the refusal of the court to charge as requested. In this there was no error. If the defendant's house was the resort of prostitutes plying their vocation there, to the knowledge of the defendant, the house was a bawdy house; and this was what in substance the court charged, and the court, in stating that it had charged substantially as requested by the defendant's counsel, gave the defendant the benefit of the definition contained in his request.

The defendant's counsel requested the court to charge that the playing of cards in the defendant's house does not, of itself, make it a gambling house; and the court, in reply, said: "Except that it is the gambling for money that makes it a disorderly house." The defendant's counsel excepted. The request was directed to the point that the mere playing of cards in a house did not constitute the house a gambling house; and the remark of the court, in response to the request, amounted to an assent to this proposition.

The defendant's counsel claims that the remark is to be construed as affirming that if the jury should find that the defendant permitted gaming in his house on a single occasion he could be convicted. But the remark of the court is to be construed in connection with the previous charge and the occasion on which it was made. The court had stated to the jury that if the defendant kept a gambling house, where gamblers resorted to play for money and did so play, to the knowledge of the defendant, he was guilty. The counsel requested the court to charge a specific proposition, which the court substantially consented to, and added the element to which the defendant's request pointed, viz., that the playing must be for money in order to make the house a gambling house. If the defendant desired a specific instruction upon the point now made, he should have requested it. The court had properly defined the offence of keeping a gambling house, and the remark of the court clearly referred to a house of this character.

These are all the exceptions relied upon by counsel. We think none of them are well taken, and that the conviction should be affirmed.

All concur. *Judgment affirmed.*[1]

REX *v.* SMITH.

KING'S BENCH. 1726.

[*Reported* 1 *Strange*, 704.]

THE defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood; which the court held to be a nuisance, and fined the defendant £5.

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[1] See De Forest *v.* U. S., 11 App. D. C. 458; Smith *v.* Com., 6 B. Mon. (Ky.) 21; State *v.* Haines, 30 Me. 65; People *v.* Jackson, 3 Den. (N. Y.) 101. — ED.

REX *v.* CROSS.

WESTMINSTER SITTINGS. 1826.

[*Reported* 2 *C. & P.* 483.]

INDICTMENT for a nuisance in keeping a house for slaughtering horses at a place called Bell Isle, in the parish of St. Mary, Islington. There were also counts framed on a private Act of Parliament, 59 Geo. III. c. 39, s. 88, on which no question was raised. Plea, not guilty.

It was proved that very offensive smells proceeded from the defendant's slaughtering house to the annoyance of those who lived near it, and also of persons who passed along a turnpike road, leading from Battle Bridge to Holloway.

The defendant put in a certificate and license under the statute 26 Geo. III. c. 71, s. 1, authorizing him to keep a house for the slaughtering of horses.

ABBOTT, C. J. This certificate is no defence, and even if it were a license from all the magistrates in the county to the defendant to slaughter horses in this very place it would not entitle the defendant to continue the business there one hour after it becomes a public nuisance to the neighborhood. If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects, or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case and the making of the road in the other. *Verdict, Guilty.*[1]

HALL'S CASE.

KING'S BENCH. 1671.

[*Reported* 1 *Ventris*, 169.]

COMPLAINT was made to the Lord Chief Justice by divers of the inhabitants about Charing-Cross, that Jacob Hall was erecting of a great booth in the street there, intending to show his feats of activity, and dancing upon the ropes there, to their great annoyance by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices inveigled from their shops.

Upon this the Chief Justice appointed him to be sent for into the court, and that an indictment should be presented to the grand jury of this matter; and withal the court warned him, that he should proceed no further.

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[1] See Com. *v.* Perry, 139 Mass. 198.

But he being dismissed, they were presently after informed that he caused his workmen to go on. Whereupon they commanded the marshal to fetch him into court; and being brought in and demanded, how he durst go on in contempt of the court, he with great impudence affirmed, that he had the King's warrant for it, and promise to bear him harmless.

Then they required of him a recognizance of £300, that he should cease further building; which he obstinately refused and was committed. And the court caused a record to be made of this nuisance, as upon their own view (it being in their way to Westminster), and awarded a writ thereupon to the Sheriff of Middlesex, commanding him to prostrate the building.

And the court said, things of this nature ought not to be placed amongst people's habitations, and that it was a nuisance to the King's royal palace; besides that it straitened the way and was insufferable in that respect.[1]

ANONYMOUS.

NISI PRIUS. 1699.

[*Reported* 12 *Modern*, 342.]

ONE was indicted for a nuisance for keeping several barrels of gunpowder in a house in Brentford town, sometimes two days, sometimes a week, till he could conveniently send them to London. Wherein

HOLT, C. J., resolved, 1st. That to support this indictment there must be apparent danger, or mischief already done.[2]

2dly. Though it had been done for fifty or sixty years, yet if it be a nuisance time will not make it lawful.

3dly. If, at the time of setting up this house in which the gunpowder is kept there had been no houses near enough to be prejudiced by it, but some were built since, it would be at peril of builder.

4thly. Though gunpowder be a necessary thing, and for defence of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants or passengers it will be a nuisance.

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[1] See Rex *v.* Bradford, Comb. 304.

[2] See Peo. *v.* Sands, 1 Johns. (N. Y.) 78.

REX *v.* BURNETT.

King's Bench. 1815.

[*Reported* 4 *Maule and Selwyn*, 272.]

The defendant, an apothecary, was indicted by that addition at the Middlesex Sessions that he, on, etc., in the fifty-fourth year, etc., and on divers other days between that day and the 29th of July, with force and arms at, etc., unlawfully and injuriously did inoculate one A. S. an infant of seven months, one W. M. an infant of one year, and divers other infants of tender years, whose names are unknown, with a certain contagious and dangerous disease called the small pox, by means of which the said A. S., W. M., and the said other infants on the said day and on the other days, etc., at, etc., became and were dangerously ill of the said contagious disease; and the defendant, well knowing the premises, after he had so inoculated them, and while they were so dangerously ill of the said contagious disease on, etc., at, etc., did unlawfully and injuriously cause the said A. S., W. M., and the said other infants, to be carried into and along a certain public street and highway, called, etc., in and along which divers subjects were then passing, and near to divers dwelling-houses, etc., to the great danger of infecting with the said contagious disease all the subjects who were on those days and times in and near the said street and highway, dwelling-houses, etc., who had not had the disease, and *ad commune nocumentum*, etc.

The indictment being removed into this court, the defendant pleaded not guilty, and was found guilty.

And now it was moved by *W. Owen*, in arrest of judgment, that this was not any offence. And he said that this indictment differed materially from that in Rex *v.* Vantandillo, 4 M. & S. 73; for by this indictment it appears that the defendant is by profession a person qualified to inoculate with this disease, provided it be lawful for any person to inoculate with it. Therefore unless the court determine that the inoculating with the small pox has now become of itself unlawful, there is nothing in this indictment to show it unlawful; for as to its being alleged that he caused them to be carried along the street, that is no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential to their recovery, air and exercise. And in Rex *v.* Sutton, which was an indictment for keeping an inoculating house, and therefore much more likely to spread infection than what has been done here, the court said that the defendant might demur.

Lord Ellenborough, C. J. The indictment lays it to be unlawfully and injuriously, and to make that out, it must be shown that what was done was in the manner of doing it incautious, and likely to affect the health of others. The words unlawfully and injuriously preclude all legal cause of excuse. And though inoculation for the small pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.

DAMPIER, J. The charge amounts to this, that the defendant, after inoculating the children, unlawfully exposed them, while infected with the disease, in the public street to the danger of the public health.

LE BLANC, J. in passing sentence observed that the introduction of vaccination did not render the practise of inoculation for the small pox unlawful, but that in all times it was unlawful, and an indictable offence, to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a public place of resort.[1]

The defendant was sentenced to six months' imprisonment.

LORD ELLENBOROUGH, C. J., in Williams *v.* East India Co., 3 East 192, 200. That the declaration in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of an highly dangerous combustible nature, imputes to the defendants a criminal negligence cannot well be questioned. In order to make the putting on board wrongful the defendants must be conusant of the dangerous quality of the article put on board; and if being so, they yet gave no notice considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least.

REGINA *v.* PARDENTON.

CENTRAL CRIMINAL COURT. 1853.

[*Reported* 6 *Cox C. C.* 247.]

Richard Pardenton and Joseph Woods were indicted for unlawfully and negligently driving a certain railway engine in an incautious, careless, and negligent manner, and without regarding a certain signal of danger, whereby the life and limbs of divers persons were greatly endangered. Three other counts varying the manner of stating the charge.

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[1] See Reg. *v.* Henson, Dears. 24; Reg. *v.* Lister, Dears. & B. 209 (but see People *v.* Sands, 1 Johns. 78); U. S. *v.* Hart, 1 Pet. C. C. 390. — ED.

The indictment was founded upon the 13th, 14th, and 15th sections of 3 & 4 Vict. c. 97. A difficulty occurred on the first three counts, founded on the 13th section, as to the jurisdiction of this Court; it being directed that upon the magistrate declining to act summarily, the complaint should be removed to the Quarter Sessions.[1]

Chambers [for the prosecution] admitted that there was no act which placed the Central Criminal Court in the same position as a Court of Quarter Sessions. But still the question would arise whether, although the offence was alleged to be against the form of the statute, the indictment did not disclose an offence at common law, where it charged acts endangering the lives of Her Majesty's subjects.

Cresswell, J. Do you mean to argue that if a man were to gallop a horse furiously through the public streets without hurting any person, that he would be guilty of a misdemeanor because he might be convicted of manslaughter if any one were knocked down by him and killed?

Without hearing the evidence, I think this case is now ripe for decision. Whatever construction may be put upon the 13th and 14th sections of the act referred to as regards the first three counts, I have no difficulty in saying that these counts do not disclose any offence at common law.

SECTION IV.

Incomplete Offences.

REX *v.* RODERICK.

Stafford Assizes. 1837.

[*Reported* 7 *C. & P.* 795.]

Misdemeanor. The first count of the indictment charged the prisoner with unlawfully knowing a child under the age of twelve years. Second count, for attempting so to do. Third count, for a common assault.

F. V. Lee, for the prisoner, objected that an attempt to commit a statutory misdemeanor was not a misdemeanor.

Godson, for the prosecution, cited the case of Rex *v.* Butler, 6 C. & P. 368.

Parke, B. If this offence is made a misdemeanor by statute, it is made so for all purposes. There are many cases in which an attempt to commit a misdemeanor has been held to be a misdemeanor; and an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute or was an offence at common law.

Verdict, guilty.

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[1] This short statement is taken from the report in 38 Cent. Crim. Ct. Rep. 691. Only so much of the case as discusses the offence at common law is given. — Ed.

REGINA *v.* COLLINS.

CROWN CASE RESERVED. 1864.

[*Reported* 9 *Cox C. C.* 497.]

CASE reserved for the opinion of this court by the Deputy-Assistant Judge at the Middlesex Sessions.

The prisoners were tried before me at the Middlesex Sessions on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal, &c.

The evidence showed clearly that one of the prisoners put his hand into the gown pocket of a lady, and that the others were all concerned in the transaction.

The witness who proved the case said on cross-examination that he asked the lady if she had lost anything, and she said "No."

For the defence it was contended that to put a hand into an empty pocket was not an attempt to commit felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence.

I declined to stop the case upon this objection; but as such cases are of frequent occurrence, I thought it right that the point should be determined by the authority of the Court of Criminal Appeal.

The jury found all the prisoners guilty, and the question upon which the opinion of your Lordships is respectfully requested is, whether under the circumstances the verdict is sustainable in point of law?

The prisoners are in custody awaiting sentence.

JOSEPH PAYNE, Deputy-Assistant Judge.

Poland, for the prisoners. The conviction is bad. It is not an indictable offence to put a hand into an empty pocket with intent to steal, but an offence punishable only under the Vagrant Act. It is not alleged in the indictment that there was any property in the pocket. This is very like the case of Reg. *v.* M'Pherson (1 Dears. & B. 197; 7 Cox Crim. Cas. 281), where it was held that a man who was charged with breaking and entering a dwelling-house and stealing certain specified goods, could not be convicted unless the specified goods were in the house, notwithstanding other goods were there. [COCKBURN, C. J. That case proceeds on the ground that you must prove the property as laid.] In the course of the argument BRAMWELL, B., put this very case, and said: "The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible; but supposing a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?" So in R. *v.* Scudder (3 C. & P. 605) it was held that there could not be a conviction for administering a drug to a woman to procure abortion, if it appeared that the woman was not with child at all. That case was before the Consolidation Act (24 & 25 Vict. c. 96). [Bramwell, B. You may put this case: Suppose a man takes away an umbrella from a stand with intent to steal it, believing it not to be his own, but it turns out to be his own, could he be convicted of attempting to steal?] It is submitted that he could not.

Metcalfe, for the prosecution. The fallacy in the argument on the other side consists in assuming that it is necessary to prove anything more than an attempt to steal. The intent to steal, it is conceded, is not sufficient; but any act done to carry out the intent, as putting a hand into the pocket, will do. [Crompton, J. Suppose a man were to go down a lane armed with a pistol, with the intention to rob a particular person, whom he expected would pass that way, and the person does not happen to come, would that be an attempt to rob the person?]

Cockburn, C. J. We are all of opinion that this conviction cannot be sustained, and in so holding it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of this court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny? We are far from saying that if the question whether there was anything in the pocket of the prosecutrix had been left to the jury, there was not evidence on which they might have found that there was, in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. This case is governed by that of Reg. *v.* M'Pherson; and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there was nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the jury in this case, either directly, or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed.[1] *Conviction quashed.*

COMMONWEALTH *v.* GREEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1824.

[*Reported 2 Pickering*, 380.]

AT May term, 1823, in the county of Hampden, the prisoner, an infant under the age of fourteen years, was convicted of an assault with intent to commit a rape.

And now, upon a motion in arrest of judgment, *E. H. Mills* and *G. Bliss*, junior, for the prisoner, contended that it was clear from all the authorities that an infant under that age is presumed by law to be unable to commit a rape (1 Haile's P. C. 630; 4 Bl. Com. 212; 1 East's P. C. 446, § 8); and in 3 Chit. Cr. L. 811, it is said that no evidence will be admitted to implicate him as the actual ravisher, though he may be guilty as an abettor. It would be absurd then to say that he may be indicted for an attempt to do what the law presumes him incapable of doing. Suppose an assault by a man upon another man dressed in woman's apparel; an indictment charging him with an assault with intent to commit a rape could not be sustained. So a female could not be indicted for an assault with such an intent. An indictment for throwing oil of vitriol with intent to burn a person's clothes might be good; but not so of an indictment for throwing water with such an intent. If a woman were indicted for petty treason, and it should appear that she had not been married, she could not be convicted. A man cannot be convicted of a rape on his own wife, nor of attempting to commit one, because the matrimonial consent cannot be retracted. In like manner the prisoner cannot be convicted of a rape, nor of an attempt to commit one, because the law presumes him to be incapable. To constitute an offence there must be an intent coupled with an act, and likewise a legal ability to do the thing attempted. In regard to the physical powers of the prisoner the court cannot go into the inquiry whether here is a particular exception contrary to the general rule of law. We do not contend that the prisoner may not be punished for the assault, but only that he is not indictable for an assault with the intent alleged in this indictment.

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[1] This decision was overruled by Reg. *v.* Ring, 17 Cox, C. C. 491.

"If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offense within such a statute. The poverty of language compels one to say, 'an attempt to kill by way of witchcraft,' but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief."— POLLOCK, C. B., in Att'y-Gen'l *v.* Sillem, 2 H. & C. 431, 525.— ED.

Davis, Solicitor-General, for the Commonwealth. The maxim that an infant under the age of fourteen years is presumed unable to commit a rape, is indeed found in the books. It originated in ancient times, and it requires to be subjected to the examination of a modern judicial tribunal. That no evidence shall be admitted to impeach this presumption is the *dictum* of one writer only, and it cannot hold universally. In some cases an infant under fourteen years is physically able, and there was evidence of it in the present case; it would be absurd then by such presumption to shut out the fact itself. The maxim is founded on the principle that there must be both penetration and emission; but this idea is now exploded. 1 Hale's P. C. 628; 3 Inst. 59, 60; 1 East's P. C. 436, § 3; 1 Russell on Crimes, 805. In Pennsylvania *v.* Sullivan, Addis. 143, it is said that the essence of the crime is the violence to the person and feelings of the woman. An injury to the feelings may be inflicted by a person under fourteen years as much as by one over that age; and where there is a guilty intention in the perpetrator of the injury, there seems to be no good reason for exonerating him from punishment on account of his physical incapacity.

Mills, in reply, said the law was not clear as to what facts are necessary to constitute the crime of rape, and in addition to the authorties before cited to this point, he referred to 12 Co. 37; 1 Hawk. P. C. c. 41, § 3.

By the Court (Parker, C. J., dissenting). The court are of opinion that the verdict must stand and judgment be rendered on it. The law which regards infants under fourteen as incapable of committing rape was established *in favorem vitæ*, and ought not to be applied by analogy to an inferior offence, the commission of which is not punished with death. A minor of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with an intent to commit that crime, although by an artificial rule he is not punishable for the crime itself. An intention to do an act does not necessarily imply an ability to do it; as a man who is emasculated may use force with intent to ravish, although possibly, if a certain effect should be now, as it was formerly, held essential to the crime, he could not be convicted of a rape. Females might be in as much danger from precocious boys as from men, if such boys are to escape with impunity from felonious assaults, as well as from the felony itself.[1] *Motion overruled.*

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[1] *Contra*, State *v.* Sam, Winston, 300 (attempt); Rex *v.* Eldershaw, 3 C. & P. 396; Reg. *v.* Philips, 8 C. & P. 736; State *v.* Handy, 4 Harr. 566 (assaults with intent).

COMMONWEALTH *v.* McDONALD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850.

[*Reported* 5 *Cushing*, 365.]

THE defendant was indicted in the municipal court, and there tried before Mellen, J., for an attempt to commit a larceny from the person.

At the trial, there being no evidence, on the part of the prosecution, that the individual from whom the defendant was charged with an attempt to steal, had any property upon his person at the time of the alleged attempt, the defendant asked the judge to rule that the indictment could not be sustained.[1]

But the presiding judge ruled otherwise; and, the jury thereupon returning a verdict of guilty, the defendant excepted.

T. Willey, for the defendant.

Clifford, Attorney-General, for the Commonwealth.

FLETCHER, J. It was said, in argument for the defendant, that he could not be said to have attempted to steal the property of the unknown person, if there was no property to be stolen; and that therefore the indictment should have set out the property and shown the existence and nature of it by the proof. But it will appear at once, by a simple reference to the import of the term "attempt," that this proposition cannot be maintained. To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains nevertheless chargeable with the attempt, and with the act done towards the commission of the theft. So a man may make an attempt, an experiment, to pick a pocket, by thrusting his hand into it, and not succeed, because there happens to be nothing in the pocket. Still he has clearly made the attempt, and done the act towards the commission of the offence. So in the present case it is not probable that the defendant had in view any particular article, or had any knowledge whether or not there was anything in the pocket of the unknown person; but he attempted to pick the pocket of whatever he might find in it, if haply he should find anything; and the attempt, with the act done of thrusting his hand into the pocket, made the offence complete. It was an experiment, and an experiment which, in the language of the statute, failed; and it is as much within the terms and meaning of the statute, if it failed by reason of there being nothing in the pocket, as if it had failed from any other cause. The following cases fully support the view taken in this case, and I am not aware of any opposing authorities: King *v.* Higgins, 2 East, 5; People *v.* Bush, 4 Hill, 133; Josslyn *v.* Commonwealth, 6 Met. 236; Rogers *v.* Commonwealth, 5 S. & R. 463.

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[1] Only so much of the case as relates to this point is printed.

This decision is confined to the particular case under consideration, of an attempt to steal from the person; as there may perhaps be cases of attempts to steal where it would be necessary to set out the particular property attempted to be stolen, and the value. It not being necessary, in the present case, to set out in the indictment the property attempted to be stolen, the defendant's exception to the ruling of the judge, that there need be no evidence of any property in the pocket of the unknown person, cannot, of course, be sustained, unless such evidence was made necessary by the allegations in the indictment.

The indictment alleges that the defendant attempted to steal from the unknown person his personal property then in his pocket and in his possession, neither the name nor the value of the property being known to the jurors. But this allegation is wholly unnecessary and immaterial, and may be stricken out; and the indictment will still remain sufficient, and contain all the allegations necessary to make out the offence against the defendant, and to warrant the conviction.

It not being necessary to allege that there was anything in the pocket of the unknown person, and as all that part of the indictment may be stricken out, the ruling of the court, that there need be no evidence of any property in the pocket of the person, was correct, and is fully supported by authority. Roscoe, Crim. Ev. 100.

Exceptions overruled.[1]

PEOPLE *v.* LEE KONG.

SUPREME COURT OF CALIFORNIA. 1892.

[*Reported* 95 *California*, 666.]

GAROUTTE, J. Appellant was convicted of the crime of an assault with intent to commit murder, and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict.

The facts of the case are novel in the extreme, and when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent.

A policeman secretly bored a hole in the roof of appellant's building, for the purpose of determining, by a view from that point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the contemplated point of observation, he fired his pistol at the spot. He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but very fortunately for the officer of the law, at the moment of attack he was upon the roof at a different spot, viewing the scene of action, and thus no substantial results followed from appellant's fire.

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[1] *Accord* State *v.* Wilson, 30 Conn. 505; People *v.* Jones, 46 Mich. 441; People *v.* Moran, 123 N. Y. 254. And see Harvick *v.* State, 49 Ark. 514; Clark *v.* State, 86 Tenn. 511.

The intent to kill is quite apparent from the evidence, and the single question is presented, Do the facts stated constitute an assault? Our criminal code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt, and there must be a present ability, to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one. For the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country, that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offence to the same degree as if he had money or other personal property which could be the subject of larceny. State *v.* Wilson, 30 Conn. 500; Commonwealth *v.* McDonald, 5 Cush. 365; People *v.* Jones, 46 Mich. 441; People *v.* Moran, 123 N. Y. 254.

Having determined that appellant was guilty of an unlawful attempt to kill, was such attempt coupled with the present ability to accomplish the deed? In the case of People *v.* Yslas, 27 Cal. 633, this court said: "The common-law definition of an assault is substantially the same as that found in our statute." Conceding such to be the fact, we cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear. Under our statute it cannot be said that a person with an unloaded gun would have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be. It was held, in the case of State *v.* Swails, 8 Ind. 524, that there was no assault to commit murder where A fires a gun at B at a distance of forty feet, with intent to murder him, if the gun is in fact loaded with powder and a slight cotton wad, although A believes it to be loaded with powder and ball. The later Indiana cases support this rule, although in Kunkle *v.* State, 32 Ind. 220, the court, in speaking of the Swails case, said: "But if the case is to be understood as laying down the broad proposition that to constitute an assault . . . with intent to commit felony, the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval." In the face of the fact that the statute of this State in terms requires that in order to constitute an assault the unlawful attempt and present ability must be conjoined, Kunkle *v.* State, 32 Ind. 220, can have no weight here. In State *v.* Napper, 6 Nev. 115, the court reversed the judgment upon the ground that the people failed to prove that the pistol with which the assault was alleged to have been made was loaded, and that consequently there was no proof that the defendant had the present ability to inflict the injury.

It is not the purpose of the court to draw nice distinctions between an attempt to commit an offence and an assault with intent to commit the offence, for such distinctions could only have the effect to favor the escape of criminals from their just deservings. And in view of the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no object in carrying the discussion of the subject to any greater lengths.

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfil the mission intended was not attributable to forbearance or kindness of heart upon defendant's part: neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet. See Cowley *v.* State, 10 Lea, 282. The fact that the shots were directed indiscriminately into the house rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point, could not affect the question. The assault would be complete and entire in either case. If a man intending murder, being in darkness and guided by sound only, should fire, and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol-ball, the crime of assault to commit murder would be made out; for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, or if through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course from the intended point of attack, and by reason of the occurrence of any one of these contingencies the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established.

The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired, is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt.

Let the judgment and order be affirmed.

PATTERSON, J., concurred.

HARRISON, J., concurring. I concur in the judgment, upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability — that is, an ability by the means then employed by him in furtherance of such attempt — to commit murder upon the policeman.[1]

RESPUBLICA *v.* MALIN.

OYER AND TERMINER, PHILADELPHIA. 1778.

[*Reported* 1 *Dallas*, 33.]

INDICTMENT for high treason.[2] The prisoner, mistaking a corps of American troops for British, went over to them. And now the Attorney-General offered evidence of words spoken by the defendant, to prove this mistake, and his real intention of joining and adhering to the enemy.

BY THE COURT. No evidence of words relative to the mistake of the American troops can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason.

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[1] Acc. State *v.* Mitchell (Mo.), 71 S. W. 175. In that case Gantt, J., said: "The intent evidenced by the firing into the bedroom with a deadly weapon, accompanied by a present capacity in defendant to murder Warren if he were in the room, and the failure to do so only because Warren happily retired upstairs instead of in the bed into which defendant fired, made out a perfect case of an attempt."

[2] The statement of the case is abridged, and part only of the opinion is given.

PEOPLE *v.* JAFFE.

COURT OF APPEALS OF NEW YORK. 1906.

[*Reported* 185 *N. Y.* 497.]

WILLARD BARTLETT, J. The indictment charged that the defendant on the 6th day of October, 1902, in the county of New York, feloniously received twenty yards of cloth of the value of twenty-five cents a yard belonging to the copartnership of J. W. Goddard & Son, knowing that the said property had been feloniously stolen, taken and carried away from the owners. It was found under section 550 of the Penal Code, which provides that a person who buys or receives any stolen property, knowing the same to have been stolen, is guilty of criminally receiving such property. The defendant was convicted of an attempt to commit the crime charged in the indictment. The proof clearly showed, and the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6th, 1902, had lost their character as stolen goods at the time when they were offered to the defendant, and when he sought to buy them. In fact the property had been restored to the owners and was wholly within their control, and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether upon an indictment for receiving goods knowing them to have been stolen the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property.

The conviction was sustained by the Appellate Division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the pickpocket cases, where in prosecutions for attempts to commit larceny from the person by pocket picking it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. (Commonwealth *v.* McDonald, 5 Cush. 365; Rogers *v.* Commonwealth, 5 S. & R. 463; State *v.* Wilson, 30 Conn. 500; People *v.* Moran, 123 N. Y. 254.) Much reliance was also placed in the opinion of the learned Appellate Division upon the case of People *v.* Gardner (144 N. Y. 119), where a conviction of an attempt to commit the crime of extortion was upheld, although the woman from whom the defendant sought to obtain money by a threat to accuse her of a crime was not induced to pay the money by fear, but was acting at the time as a decoy for the police, and hence could not have been subjected to the influence of fear.

In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, therefore, if it had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a non-existent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. (2 Bishop's New Crim. Law, § 1140.) It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact.

The crucial distinction between the case before us and the pickpocket cases, and others involving the same principle, lies not in the possibility or impossibility of the commission of the crime, but in the fact that in the present case the act, which it was doubtless the intent of the defendant to commit, would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy, and received them into his possession, he would have committed no offence under section 550 of the Penal Code, because the very definition in that section of the offence of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such manner as to constitute larceny. This knowledge being a material ingredient to the offence it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and in fact. He may believe it to be so, but belief is not enough under this statute. In the present case it appeared not only by the proof but by the express concession of the prosecuting officer that the goods which the defendant intended to purchase had lost their character as stolen goods at the time of the proposed transaction. Hence, no matter what was the motive of the defendant, and no matter what he supposed, he could do no act which was intrinsically adapted to the then present successful perpetration of the crime denounced by this section of the Penal Code, because neither he nor any one in the world could know that the property was stolen property, inasmuch as it was not in fact stolen property.

In the pickpocket cases the immediate act which the defendant had in contemplation was an act which if it could have been carried out would have been criminal, whereas in the present case the immediate act which the defendant had in contemplation (to wit, the purchase of the goods which were brought to his place for sale) could not have been criminal under the statute even if the purchase had been completed, because the goods had not in fact been stolen, but were at the time when they were offered to him in the custody and under the control of the true owners.

If all which an accused person intends to do would, if done, constitute no crime it cannot be a crime to attempt to do with the same purpose a part of the thing intended. (1 Bishop's Crim. Law [7th ed.], sec. 747.) The crime of which the defendant was convicted necessarily consists of three elements: first, the act; second, the intent; and third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft.

The language used by RUGER, C. J., in People *v.* Moran (123 N. Y. 254), quoted with approval by EARL, J., in People *v.* Gardner (144 N. Y. 119), to the effect that "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design," although accurate in those cases has no application to a case like this, where, if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offence. A particular belief cannot make that a crime which is not so in the absence of such belief. Take, for example, the case of a young man who attempts to vote, and succeeds in casting his vote under the belief that he is but twenty years of age, when he is in fact over twenty-one and a qualified voter. His intent to commit a crime, and his belief that he was committing a crime, would not make him guilty of any offence under these circumstances, although the moral turpitude of the transaction on his part would be just as great as it would if he were in fact under age. So, also, in the case of a prosecution under the statute of this state, which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of eighteen years. There could be no conviction if it was established upon the trial that the female was in fact over the age of eighteen years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act forbidden by this particular statute. "If what a man contemplates doing would not be in law a crime, he could not be said in point of law to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding where the law holds it not to be such, his real intent being to do a particular thing. If the thing is not a crime he does not intend to commit one, whatever he may erroneously suppose." (1 Bishop's Crim. Law [7th ed.,] sec. 742.)

The judgment of the Appellate Division of the Court of General Sessions must be reversed and the defendant discharged upon this indictment, as it is manifest that no conviction can be had thereunder. This discharge, however, in no wise affects the right to prosecute the defendant for other offences of a like character, concerning which there is some proof in the record, but which were not charged in the present indictment.

CHASE, J. (dissenting). I dissent. Defendant having with knowledge repeatedly received goods stolen from a dry goods firm by one of its employees, suggested to the employee that a certain specified kind of cloth be taken, he was told by the employee that that particular kind of cloth was not kept on his floor, and he then said that he would take a roll of a certain Italian cloth. The employee then stole a roll of the Italian cloth and carried it away, but left it in another store where he could subsequently get it for delivery to the defendant. Before it was actually delivered to the defendant the employers discovered that the employee had been stealing from them, and they accused him of the thefts. The employee then confessed his guilt, and told them of the piece of cloth that had been stolen for the defendant, but had not actually been delivered to him. The roll of cloth so stolen was then taken by another employee of the firm, and it was arranged at the police headquarters that the employee who had taken the cloth should deliver it to the defendant, which he did, and the defendant paid the employee about one-half the value thereof. The defendant was then arrested and this indictment was thereafter found against him. That the defendant intended to commit a crime is undisputed. I think the record shows an attempt to commit the crime of criminally receiving property as defined in sections 550 and 34 of the Penal Code, within the decisions of this court in People *v.* Moran (123 N. Y. 254) and People *v.* Gardner (144 N. Y. 119).

CULLEN, C. J., GRAY, EDWARD T. BARTLETT, VANN and WERNER, JJ., concur with WILLARD BARTLETT, J.; CHASE, J., dissents in memorandum.

Judgment of conviction reversed, etc.[1]

UNITED STATES *v.* STEPHENS.

CIRCUIT COURT OF UNITED STATES, DISTRICT OF OREGON. 1882.

[*Reported* 8 *Sawyer*, 116.]

DEADY, J.[2] On March 30, 1882, an information was filed by the district attorney, accusing the defendant, by the first count, of the crime of introducing spirituous liquors into the district of Alaska, contrary to law; and, by the second count, of the crime of "attempting" to so introduce such liquors into said district.[1] The defendant demurs to the information because it does not state facts sufficient to constitute a crime.

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[1] See Marley *v.* State, 58 N. J. L. 207. — ED.

[2] Part of the opinion only is printed. — ED.

Upon the argument of the demurrer it was abandoned as to the first count, and insisted upon as to the second. This count alleges that on July 14, 1879, the defendant, being in the district of Alaska, wrote and transmitted a letter to a certain firm in San Francisco, California, wherein and whereby he requested said firm to ship and send to him at Fort Wrangel, in said district, one hundred gallons of whiskey; the defendant then well knowing that said firm were then wholesale dealers in spirituous liquors, and owned and possessed said one hundred gallons of whiskey; "and he thereby contriving and intending to introduce the said one hundred gallons of whiskey into the said district of Alaska."

There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but are not, in a legal sense, a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations, — conditions, not causes, — and although coexistent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions without which the shooting or poisoning could not take place, but they are not, in the eye of the law, the cause of either. 1 Whart. C. L., secs. 178, 181; 1 Bish. C. L., sec. 668 *et seq.;* The People *v.* Murray, 14 Cal. 160.

Dr. Wharton says (*supra*, sec. 181): "To make the act an indictable attempt, it must be a cause as distinguished from a condition; and it must go so far that it would result in the crime unless frustrated by extraneous circumstances." Bishop says (*supra*, sec. 669): "It is plain that if a man who has a wicked purpose in his heart does something entirely foreign in its nature from that purpose, he does not commit a criminal attempt to do the thing proposed. On the other hand, if he does what is exactly adapted to accomplish the evil meant, yet proceeds not far enough in the doing for the cognizance of the law, he still escapes punishment. Again, if he does a thing not completely, as the result discloses, adapted to accomplish the wrong, he may under some circumstances be punishable, while under other circumstances he may escape. And the difficulty is not a small one, to lay down rules readily applied, which shall guide the practitioner in respect to the circumstances in which the criminal attempt is sufficient."

In The People *v.* Murray, *supra*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage, that he eloped with his niece for that purpose, and requested a third person to get a magistrate to perform the ceremony. Upon an appeal the judgment was reversed. Chief Justice FIELD, delivering the opinion of the court, said: "It (the evidence) shows very clearly the intention of the defendant; but something more than mere intention is necessary to constitute the offence charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made . . . ; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party."

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[1] This was made criminal by Act of March 3, 1873 (17 Stat. at L. 530). — ED.

In the case under consideration, to constitute the attempt charged in the information there must have been an intent to commit the crime of introducing spirituous liquors into Alaska, combined with an act done in pursuance of such intention that apparently, in the usual course of events, would have resulted in such introduction, unless interrupted by extraneous circumstances, but which actually fell short of such result.

But it does not appear that anything was done by the defendant towards the commission of the intended crime of introducing spirituous liquors into Alaska, but to offer or attempt to purchase the same in San Francisco. The written order sent there by the defendant was, in effect, nothing more or less than an offer by him to purchase the one hundred gallons of whiskey; and it will simplify the case, to regard him as being present at the house of the San Francisco firm, at the time his order reached them, seeking to purchase the liquor with the intent of committing the crime of introducing the same into Alaska.

But the case made by the information stops here. It does not show that he bought any liquor. Whether he changed his mind, and countermanded the order before the delivery of the goods, or whether the firm refused to deal with him, does not appear.

Now, an offer to purchase whiskey, with the intent to ship it to Alaska, is, in any view of the matter, a mere act of preparation, of which the law takes no cognizance. As the matter then stood, it was impossible for the defendant to attempt to introduce this liquor into Alaska, because he did not own or control it. It was simply an attempt to purchase, — an act harmless and indifferent in itself, whatever the purpose with which it was done.

But suppose the defendant had gone further, and actually succeeded in purchasing the liquor, wherein would the case differ from that of the person who bought the gun or poison with intent to commit murder, but did no subsequent act in execution of such purpose? In all essentials they are the same.

A purchase of spirituous liquor at San Francisco or Portland, either in person or by written order or application, with intent to commit a crime with the same, — as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska, — is merely a preparatory act, indifferent in its character, of which the law, lacking the omniscience of Deity, cannot take cognizance.

At what period of the transaction the shipper of liquor to Alaska is guilty of an attempt to introduce the same there, is not very easily determined. Certainly the liquor must first be purchased — obtained in some way — and started for its illegal destination. But it is doubtful whether the attempt, or the act necessary to constitute it, can be committed until the liquor is taken so near to some point or place of "the mainland, islands, or waters" of Alaska as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned. But this is a mere suggestion; and each case must be determined upon its own circumstances.

The demurrer is sustained to the second count, and overruled as to the first.

GLOVER *v.* COMMONWEALTH.

SUPREME COURT OF APPEALS OF VIRGINIA. 1889.

[*Reported* 86 *Virginia*, 382.]

LEWIS, P., delivered the opinion of the court.

Among the exceptions taken by the prisoner at the trial was one to the refusal of the court to instruct the jury as follows: "If the jury believe from the evidence that the prisoner at the bar intended to commit a rape on the prosecutrix, Berta Wright, but before the act was finally executed, he voluntarily and freely abandoned it, they are to find a verdict of not guilty."[1]

This exception is not well taken. To have given the instruction would have been equivalent to telling the jury that upon an indictment for rape, the accused cannot be legally convicted of an attempt to commit a rape, which is not the law. The court, therefore, did not err in refusing to give it, nor did it err in subsequently instructing the jury, as in effect it did, that upon an indictment for rape, the accused may be found guilty of an attempt to commit a rape, which is in accordance with the law in this State. Givens *v.* Commonwealth, 29 Gratt. 830; Mings *v.* Same, 85 Va. 638. Indeed, the statute, now brought into section 4044 of the Code, expressly enacts that "on an indictment for felony, the jury may find the accused not guilty of the felony, but guilty of an attempt to commit such felony; and a general verdict of not guilty upon such indictment shall be a bar to a subsequent prosecution for an attempt to commit such felony."

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[1] Only so much of the opinion as refers to this exception is printed.

An attempt in criminal law is an apparent unfinished crime, and hence is compounded of two elements, viz.: (1) The intent to commit a crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adapted to produce the result intended. It must be something more than mere preparation. Uhl's Case, 6 Gratt. 706; Hicks' Case, 86 Va. 223.

Hence, when the prisoner took the prosecutrix into the stable, and there did the acts above mentioned, the attempt to commit a rape was complete; for there was the unlawful intent accompanied by acts done towards the commission of the intended crime, but falling short of its commission. Indeed, it is not denied that there was such attempt, but it is contended — and such was the main defence at the trial — that the subsequent voluntary abandonment of the criminal purpose cleansed the prisoner of all crime, so far as the attempt was concerned. But this is a mistaken view. For, on the contrary, it is a rule, founded in reason and supported by authority, that if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose.

In Lewis *v.* The State, 35 Ala. 380, which was an indictment for an attempt to commit a rape, it was ruled by the Supreme Court of Alabama that if the attempt was in fact made, and had progressed far enough to put the prosecutrix in terror and render it necessary for her to save herself from the consummation of the attempted outrage by flight, then the attempt was complete, though the prisoner had not in fact touched her; and that an after-abandonment by the prisoner of his wicked purpose could not purge the crime. And there are many other authorities to the same effect. See 1 Bish. Crim. Law (6th ed.), sec. 732, and cases cited.

COMMONWEALTH *v.* KENNEDY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897.

[*Reported* 170 *Mass* 18.]

HOLMES, J.[1] The first count is for mingling poison with tea, with intent to kill one Albert F. Learoyd. Pub. Sts. c. 202, § 32. The second count is for an attempt to commit murder by poisoning. Pub. Sts. c. 202, § 21. Whether the first count includes the matter of the second, with the effect that, even if the motion to quash the second count should have been granted, the verdict as rendered would stand on the first count (Commonwealth *v.* Nichols, 134 Mass. 531, 536, 537), need not be decided, as we are of opinion that the motion to quash properly was overruled.

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[1] Only so much of the opinion as discusses the law of attempt is given. — ED.

The second count alleges in substance that the defendant feloniously, wilfully, and maliciously attempted to murder Learoyd by placing a quantity of deadly poison known as "rough on rats," known to the defendant to be a deadly poison, upon, and causing it to adhere to the under side of the crossbar of a cup of Learoyd's known as a mustache cup, the cup being then empty, with the intent that Learoyd should thereafter use the cup for drinking while the poison was there, and should swallow the poison. The motion to quash was argued largely on the strength of some cases as to what constitutes an "administering" of poison, which have no application, but the argument also touched another question, which always is present in cases of attempts, and which requires a few words, namely, how nearly the overt acts alleged approached to the achievement of the substantive crime attempted.

Notwithstanding Pub. Sts. c. 210, § 8, we assume that an act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But, on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces, but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head is not aimed straight, and therefore in the course of nature cannot hit him. Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. In this case the acts are alleged to have been done with intent that Learoyd should swallow the poison, and, by implication, with intent to kill him. See Commonwealth *v.* Adams, 127 Mass. 15, 17. Intent imports contemplation, and more or less expectation, of the intended end as the result of the act alleged. If it appeared in the count, as it did in the evidence, that the habits of Learoyd and the other circumstances were such that the defendant's expectation that he would use the cup and swallow the poison was well grounded, there could be no doubt that the defendant's acts were near enough to the intended swallowing of the poison, and, if the dose was large enough to kill, that they were near enough to the accomplishment of the murder. But the grounds of the defendant's expectation are not alleged, and the strongest argument for the defence, as it seems to us, would be that, so far as this count goes, his expectation may have been unfounded and unreasonable. But in view of the nature of the crime and the ordinary course of events, we are of opinion that enough is alleged when the defendant's intent is shown. The cup belonged to Learoyd, and the defendant expected that he would use it. To allow him immunity, on the ground that this part of his expectation was ill grounded, would be as unreasonable as to let a culprit off because he was not warranted in thinking that his pistol was pointed at the man he tried to shoot. A more important point is that it is not alleged in terms that the dose was large enough to kill, unless we take judicial notice of the probable effect of a teaspoonful of "rough on rats"; and this may be likened to the case of firing a pistol supposed to be loaded with ball, but in fact not so, or to administering an innocent substance supposing it to be poison. State *v.* Swails, 8 Ind. 524, and note. State *v.* Clarissa, 11 Ala. 57. There is a difference between the case of an attempt and a murder. In the latter case the event shows the dose to have been sufficient, without an express allegation. But we are of opinion that this objection cannot be maintained. Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death, according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. But analogy does not require this consideration. The case cited as to firing a pistol not loaded with ball has been qualified at least by a later decision, Kunkle *v.* State 32 Ind. 220, 229, a case of shooting with shot too small to kill. And even in less serious crimes (especially in view of Pub. Sts. c. 210, § 8), impossibility of achievement is not necessarily a defence, for instance, in an attempt to procure an abortion upon a woman not pregnant. Commonwealth *v.* Taylor, 132 Mass. 261. Commonwealth *v.* Tibbetts, 157 Mass. 519. So in an attempt to pick a pocket which is empty. Commonwealth *v.* McDonald, 5 Cush. 365. See also Commonwealth *v.* Jacobs, 9 Allen, 274. In the case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts; *e. g.*, in the case of treason, Foster, 196; King *v.* Cowper, 5 Mod. 206; or in that of pursuit by a negro, with intent to commit rape. Lewis *v.* State, 35 Ala. 380. Compare Regina *v.* Eagleton, Dears. C. C. 515, 538; *S. C.* 6 Cox, C. C. 559, 571. A familiar statutory illustration of this class is to be found in the enactments with regard to having counterfeit bills in one's possession with intent to pass them, Pub. Sts. c. 204, § 8 (see Regina *v.* Roberts, Dears. C. C. 539, 550, 551), and one which is interesting historically in the English statutes intended to keep secret the machinery used in modern manufacture. Sts. 14 Geo. III. c. 71, § 5; 21 Geo. III. c. 37, § 6. The general provision of Pub. Sts. c. 210, § 8, already referred to, long has been on the books. A case having some bearing on the present is State *v.* Glover, 27 S. C. 602. For these reasons, we are of opinion that the motion to quash the second count properly was overruled.

COMMONWEALTH *v.* PEASLEE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[*Reported* 177 *Mass.* 267.]

Holmes, C. J. This is an indictment for an attempt to burn a building and certain goods therein, with intent to injure the insurers of the same. Pub. Sts. c. 210, § 8. The substantive offence alleged to have been attempted is punished by Pub. Sts. c. 203, § 7. The defence is that the overt acts alleged and proved do not amount to an offence. It was raised by a motion to quash and also by a request to the judge to direct a verdict for the defendant. We will consider the case in the first place upon the evidence, apart from any question of pleading, and afterwards will take it up in connection with the indictment as actually drawn.

The evidence was that the defendant had constructed and arranged combustibles in the building in such a way that they were ready to be lighted, and if lighted would have set fire to the building and its contents. To be exact, the plan would have required a candle which was standing on a shelf six feet away to be placed on a piece of wood in a pan of turpentine, and lighted. The defendant offered to pay a young man in his employment if he would go to the building, seemingly some miles from the place of the dialogue, and carry out the plan. This was refused. Later the defendant and the young man drove toward the building, but when within a quarter of a mile the defendant said that he had changed his mind and drove away. This is as near as he ever came to accomplishing what he had in contemplation.

The question on the evidence, more precisely stated, is whether the defendant's acts come near enough to the accomplishment of the substantive offence to be punishable. The statute does not punish every act done toward the commission of a crime, but only such acts done in an attempt to commit it. The most common types of an attempt are either an act which is intended to bring about the substantive crime and which sets in motion natural forces that would bring it about in the expected course of events but for an unforeseen interruption, as in this case if the candle had been set in its place and lighted but had been put out by the police, or an act which is intended to bring about the substantive crime and would bring it about but for a mistake of judgment in a matter of nice estimate or experiment, as when a pistol is fired at a man but misses him, or when one tries to pick a pocket which turns out to be empty. In either case the would-be criminal has done his last act.

Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps cannot be described as an attempt, because that word suggests an act seemingly sufficient to accomplish the end, and has been supposed to have no other meaning. People *v.* Murray, 14 Cal. 159, 160. That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus penitentiæ* in the need of a further exertion of the will to complete the crime. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite. Commonwealth *v.* Kennedy, 170 Mass. 18, 22. (See also Commonwealth *v.* Willard, 22 Pick. 476.) A few instances of liability of this sort are mentioned on the page cited.

As a further illustration, when the servant of a contractor had delivered short rations of meat by the help of a false weight which he had substituted for the true one, intending to steal the meat left over, it was held by four judges, two of whom were Chief Justice Erle and Mr. Justice Blackburn, that he could be convicted of an attempt to steal. Regina *v.* Cheeseman, L. & C. 140; *S. C.* 10 W. R. 225. So lighting a match with intent to set fire to a haystack, although the prisoner desisted on discovering that he was watched. Regina *v.* Taylor, 1 F. & F. 511. So getting into a stall with a poisoned potato, intending to give it to a horse there, which the prisoner was prevented from doing by his arrest. Commonwealth *v.* McLaughlin, 105 Mass. 460. See Clark *v.* State, 86 Tenn. 511. So in this Commonwealth it was held criminal to let a house to a woman of ill fame with intent that it should be used for purposes of prostitution, although it would seem that the finding of intent meant only knowledge of the intent of the lessee. Commonwealth *v.* Harrington, 3 Pick. 26. See Commonwealth *v.* Willard, 22 Pick. 476, 478. Compare Brockway *v.* People, 2 Hill, 558, 562. The same has been held as to paying a man to burn a barn, whether well laid as an attempt or more properly as soliciting to commit a felony. Commonwealth *v.* Flagg, 135 Mass. 545, 549. State *v.* Bowers, 35 So. Car. 262. Compare Regina *v.* Williams, 1 C. & K. 589; *S. C.* 1 Denison, 39. McDade *v.* People, 29 Mich. 50, 56. Stabler *v.* Commonwealth, 95 Penn. St. 318. Hicks *v.* Commonwealth, 86 Va. 223.

On the other hand, making up a false invoice at the place of exportation with intent to defraud the revenue is not an offence if not followed up by using it or attempting to use it. United States *v.* Twenty-eight Packages, Gilpin, 306, 324. United States *v.* Riddle, 5 Cranch, 311. So in People *v.* Murray, 14 Cal. 159, the defendant's elopement with his niece and his requesting a third person to bring a magistrate to perform the marriage ceremony, was held not to amount to an attempt to contract the marriage. But the ground on which this last decision was put clearly was too broad. And however it may be at common law, under a statute like ours punishing one who attempts to commit a crime "and in such attempt does any act towards the commission of such offence" (Pub. Sts. c. 210, § 8), it seems to be settled elsewhere that the defendant could be convicted on evidence like the present. People *v.* Bush, 4 Hill, 133, 134. McDermott *v.* People, 5 Parker Cr. Rep. 102. Griffin *v.* State, 26 Ga. 493. State *v.* Hayes, 78 Mo. 307, 316. See Commonwealth *v.* Willard, 22 Pick. 476. People *v.* Bush is distinguished in Stabler *v.* Commonwealth as a decision upon the words quoted. 95 Penn. St. 322.

Under the cases last cited we assume that there was evidence of a crime and perhaps of an attempt, — the latter question we do not decide. Nevertheless, on the pleadings a majority of the court is of opinion that the exceptions must be sustained. A mere collection and preparation of materials in a room for the purpose of setting fire to them, unaccompanied by any present intent to set the fire, would be too remote. If the accused intended to rely upon his own hands to the end, he must be shown to have had a present intent to accomplish the crime without much delay, and to have had this intent at a time and place where he was able to carry it out. We are not aware of any carefully considered case that has gone further than this. We assume without deciding that that is the meaning of the indictment, and it would have been proved if for instance the evidence had been that the defendant had been frightened by the police as he was about to light the candle. On the other hand, if the offence is to be made out by showing a preparation of the room and a solicitation of some one else to set the fire, which solicitation if successful would have been the defendant's last act, the solicitation must be alleged as one of the overt acts. It was admissible in evidence on the pleadings as they stood to show the defendant's intent, but it could not be relied on as an overt act unless set out. The necessity that the overt acts should be alleged has been taken for granted in our practice and decisions (see *e. g.*, Commonwealth *v.* Sherman, 105 Mass. 169; Commonwealth *v.* McLaughlin, 105 Mass. 460, 463; Commonwealth *v.* Shedd, 140 Mass. 451, 453), and is expressed in the forms and directions for charging attempts appended to St. 1899, c. 409, § 28 and § 2. Commonwealth *v.* Clark, 6 Gratt. 675. State *v.* Colvin, 90 No. Car. 717. The solicitations were alleged in McDermott *v.* People. In New York it was not necessary to lay the overt acts relied upon. Mackesey *v.* People, 6 Parker Cr. Rep. 114, 117, and New York cases *supra*. See 3 Encyc. Pl. & Pr., "Attempts," 98. A valuable collection of authorities concerning the crime will be found under the same title in 3 Am. & Eng. Encyc. of Law (2d ed.). If the indictment had been properly drawn we have no question that the defendant might have been convicted.

Exceptions sustained.

WALSH *v.* PEOPLE.

SUPREME COURT OF ILLINOIS. 1872.

[*Reported* 65 *Illinois*, 58.]

MR. JUSTICE THORNTON delivered the opinion of the court: —

The defendant below was an alderman of the Common Council of the city of Chicago. As such, he was indicted for a proposal, made by himself, to receive a bribe to influence his action in the discharge of his duties.

The indictment is, in form, an indictment at common law; and it is conceded that the statute has not created such an offence against an alderman. Our criminal code has made it an offence to propose, or agree to receive, a bribe, on the part of certain officers; but an alderman is not, either in terms or by construction, included amongst them. Rev. Stat. 1845, p. 167, s. 87.

It is contended that the act charged does not fall within any of the common law definitions of bribery; that no precedent can be found for such an offence, and that, as propositions to receive bribes have probably often been made, and as no case can be found in which they were regarded as criminal, the conclusion must follow that the offence charged is no offence.

The weakness of the conclusion is in the assumption of a premise which may or may not be true. This particular phase of depravity may never before have been exhibited; and if it had been, a change might be so suddenly made, by an acceptance of the offer and a concurrence of the parties, as to constitute the offence of bribery, which consists in the receiving any undue reward to incline the party to act contrary to the known rules of honesty and integrity.

But the character of a particular offence cannot fairly be determined from the fact that an offence exactly analogous has not been described in the books. We must test the criminality of the act by known principles of law.

At common law, bribery is a grave and serious offence against public justice; and the attempt or offer to bribe is likewise criminal.

A promise of money to a corporator, to vote for a mayor of a corporation, was punishable at common law. Rex *v.* Plympton, 2 Lord Raym. 1377.

The attempt to bribe a privy councillor, to procure an office, was an offence at common law. Rex *v.* Vaughan, 4 Burr. 2494. In that case, Lord Mansfield said: "Wherever it is a crime to take, it is a crime to give. They are reciprocal. And in many cases, especially in bribery at elections to parliament, the attempt is a crime. It is complete on his side who offers it."

Why is the mere unsuccessful attempt to bribe criminal? The officer refuses to take the offered reward, and his integrity is untouched, his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt; and as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community.

The attempt to bribe is, then, at common law a misdemeanor; and the person making the offer is liable to indictment and punishment.

What are misdemeanors at common law? Wharton, in his work on criminal law, p. 74, says: "Misdemeanors comprise all offences, lower than felonies, which may be the subject of indictment. They are divided into two classes: first, such as are *mala in se*, or penal at common law; and secondly, such as are *mala prohibita*, or penal by statute. Whatever, under the first class, mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty, when done corruptly, is the subject of indictment."

In the case of The King *v.* Higgins, 2 East, 5, the defendant was indicted for soliciting and inciting a servant to steal his master's chattels. There was no proof of any overt act towards carrying the intent into execution, and it was argued, in behalf of the prisoner, that the solicitation was a mere fruitless, ineffectual temptation, — a mere wish or desire.

It was held, by all the judges, that the soliciting was a misdemeanor, though the indictment contained no charge that the servant stole the goods, nor that any other act was done except the soliciting.

Separate opinions were delivered by all the judges.

Lord KENYON said the solicitation was an act, and it would be a slander upon the law to suppose that such an offence was not indictable.

GROSS, J., said an attempt to commit a misdemeanor was, in itself, a misdemeanor. The gist of the offence is the incitement.

LAWRENCE, J., said: "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable;" and that the mere soliciting the servant to steal was an attempt or endeavor to commit a crime.

LE BLANC, J., said that the inciting of another, by whatever means it is attempted, is an act done; and if the act is done with a criminal intent, it is punishable by indictment.

An attempt to commit an offence or to solicit its commission is at common law punishable by indictment. 1 Hawk. P. C. 55; Whar. Cr. Law, 78 and 872; 1 Russ. on Cr. 49.

While we are not disposed to concur with Wharton, to the full extent, in the language quoted, that every act which might be supposed, according to the stern ethics of some persons, to be injurious to the public morals, to be a misdemeanor, yet we are of opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one, and a solicitation to commit an offence. This, at common law, is a misdemeanor. Inciting another to the commission of any indictable offence, though without success, is a misdemeanor. 3 Chitty Cr. Law, 994; 1 Russ. on Cr. 49, Cartwright's case; Russ. and R. C. C. 107, note b; Rex *v.* Higgins, 2 East, *supra.*

As we have seen, the mere offer to bribe, though it may be rejected, is an offence; and the party who makes the offer is amenable to indictment and punishment. The offer amounts to no more than a proposal to give a bribe; it is but a solicitation to a person to take one. The distinction between an offer to bribe and a proposal to receive one, is exceedingly nice. The difference is wholly ideal. If one man attempt to bribe an officer, and influence him, to his own degradation and to the detriment of the public, and fail in his purpose, is he more guilty than the officer, who is willing to make sale of his integrity, debase himself, and who solicits to be purchased, to induce a discharge of his duties? The prejudicial effects upon society are, at least, as great in the one case as in the other; the tendency to corruption is as potent; and when the officer makes the proposal, he is not only degraded, but the public service suffers thereby.

According to the well-established principles of the common law, the proposal to receive the bribe was an act which tended to the prejudice of the community, greatly outraged public decency, was in the highest degree injurious to the public morals, was a gross breach of official duty, and must therefore be regarded as a misdemeanor, for which the party is liable to indictment.

It is an offence more serious and corrupting in its tendencies than an ineffectual attempt to bribe. In the one case the officer spurns the temptation, and maintains his purity and integrity; in the other, he manifests a depravity and dishonesty existing in himself, which, when developed by the proposal to take a bribe, if done with a corrupt intent, should be punished; and it would be a slander upon the law to suppose that such conduct cannot be checked by appropriate punishment.

In holding that the act charged is indictable, we are not drifting into judicial legislation, but are merely applying old and well-settled principles to a new state of facts.

COMMONWEALTH *v.* RANDOLPH.

SUPREME COURT OF PENNSYLVANIA. 1892.

[*Reported* 146 *Pennsylvania*, 83.]

PER CURIAM. The appellant was convicted in the court below upon an indictment in the first count of which it was charged that she, "Sarah A. McGinty, *alias* Sarah A. Randolph, . . . unlawfully, wickedly, and maliciously did solicit and invite one Samuel Kissinger, then and there being, and by the offer and promise of payment to said Samuel Kissinger of a large sum of money, to wit, one thousand dollars, which to him, the said Samuel Kissinger, she, the said Sarah A. McGinty, *alias* Sarah A. Randolph, then and there did propose, offer, promise, and agree to pay, did incite and encourage him, the said Samuel Kissinger, one William S. Foltz, a citizen of said county, in the peace of said commonwealth, feloniously to kill, murder, and slay, contrary to the form of the act of general assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania." Upon the trial below the defendant moved to quash the indictment upon the ground that "the said indictment does not charge in any count thereof any offence, either at common law or by statute." The court below refused to quash the indictment; and this ruling, with the refusal of the court to arrest the judgment, is assigned as error.

It may be conceded that there is no statute which meets this case, and, if the crime charged is not an offence at common law, the judgment must be reversed. What is a common-law offence? We endeavored to answer this question in Com. *v.* McHale, 97 Pa. 397, 410, in which we held that offences against the purity and fairness of elections were crimes at common law, and indictable as such. We there said: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy." Tested by this rule, we have no doubt that the solicitation to commit murder, accompanied by the offer of money for that purpose, is an offence at common law.

It may be conceded that the mere intent to commit a crime, where such intent is undisclosed, and nothing done in pursuance of it, is not the subject of an indictment. But there was something more than an undisclosed intent in this case. There was the direct solicitation to commit a murder, and an offer of money as a reward for its commission. This was an act done, — a step in the direction of the crime, — and had the act been perpetrated the defendant would have been liable to punishment as an accessory to the murder. It needs no argument to show that such an act affects the public policy and economy in a serious manner.

Authorities in this State are very meagre. Smith *v.* Com., 54 Pa. 209, decided that solicitation to commit fornication and adultery is not indictable. But fornication and adultery are mere misdemeanors by our law, whereas murder is a capital felony. Stabler *v.* Com., 95 Pa. 318, decided that the mere delivery of poison to a person, and soliciting him to place it in the spring of a certain party, is not "an attempt to administer poison," within the meaning of the eighty-second section of the Act of March 31, 1860, P. L. 403. In that case, however, the sixth count of the indictment charged that the defendant did "falsely and wickedly solicit and invite one John Neyer, a servant of the said Richard S. Waring, to administer a certain poison and noxious and dangerous substance, commonly called Paris green, to the said Richard F. Waring, and divers other persons, whose names are to the said inquest unknown, of the family of the said Richard F. Waring," etc.

The defendant was convicted upon this count, and while the judgment was reversed upon the first count charging "an attempt to administer poison," we sustained the conviction upon the sixth count; MERCUR, J., saying: "The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offence for which an indictment will lie without any further act having been committed. He was rightly convicted, therefore, on the sixth count."

The authorities in England are very full upon this point. The leading case is Rex *v.* Higgins, 2 East, 5. It is very similar to the case at bar, and it was squarely held that solicitation to commit a felony is a misdemeanor and indictable at common law. In that case it was said by Lord KENYON, C. J.: "But it is argued that a mere intent to commit evil is not indictable without an act done; but is there not an act done, where it is charged that the defendant solicited another to commit a felony? The solicitation is an act, and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason." We are not unmindful of the criticism of this case by Chief Justice WOODWARD in Smith *v.* Com., *supra*, but we do not think it affects the authority of that case. The point involved in Rex *v.* Higgins was not before the court in Smith *v.* Com., and could not have been and was not decided. It is true, this is made a statutory offence by St. 24 & 25 Vict.; but, as is said by Mr. Russell in his work on Crimes (volume 1, p 967), in commenting on this act: "As all the crimes specified in this clause appear to be misdemeanors at common law, the effect of this clause is merely to alter the punishment of them." In other words, that statute is merely declaratory of the common law.

Our best text-books sustain the doctrine of Rex *v.* Higgins. "If the crime solicited to be committed be not perpetrated, then the adviser can only be indicted for a misdemeanor." 1 Chit. Crim. Law, p. 264. See, also, 1 Archb. Crim. Pr. & Pl. 19, and 1 Bish. Crim. Law, § 768, where the learned author says: "The law as adjudged holds, and has held from the beginning in all this class of cases, an indictment sufficient which simply charges that the defendant, at the time and place mentioned, falsely, wickedly, and unlawfully did solicit and incite a person named to commit the substantive offence, without any further specification of overt acts. It is vain, then, to say that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offence." We are of opinion the appellant was properly convicted, and the judgment is affirmed.[1]

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[1] See State *v.* Avery, 7 Conn. 266; Com. *v.* Flagg, 135 Mass. 545. Cf. Cox *v.* People, 82 Ill. 191; Smith *v.* Com., 54 Pa. 209. — ED.

STATE *v.* HURLEY.

SUPREME COURT OF VERMONT. 1906.

[*Reported* 79 *Vt.* 000.]

MUNSON, J. The respondent is informed against for attempting to break open the jail in which he was confined by procuring to be delivered into his hands 12 steel hack saws, with an intent to break open the jail therewith. The state's evidence tended to show that, in pursuance of an arrangement between the respondent and one Tracy, a former inmate, Tracy attempted to get a bundle of hack saws to the respondent by throwing it to him as he sat behind the bars at an open window, and that the respondent reached through the bars and got the bundle into his hands, but was ordered at that moment by the jailer to drop it, and did so. The court charged in substance that if the respondent arranged for procuring the saws and got them into his possession, with an intent to break open the jail for the purpose of escaping, he was guilty of the offence alleged. The respondent demurred to the information, and excepted to the charge. Bishop defines a criminal attempt to be "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 2 Cr. Law, § 728. The main difficulty in applying this definition lies in determining the relation which the act done must sustain to the completed offence. That relation is more fully indicated in the following definition given by Stephen: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." Dig. Cr. Law, 33. All acts done in preparation are, in a sense, acts done toward the accomplishment of the thing contemplated. But most authorities certainly hold, and many of them state specifically, that the act must be something more than mere preparation. Acts of preparation, however, may have such proximity to the place where the intended crime is to be committed, and such connection with a purpose of present accomplishment, that they will amount to an attempt. See note to People *v.* Moran (N. Y.) 20 Am. St. Rep. 741; People *v.* Stiles, 75 Col. 570, 17 Pac. 963; People *v.* Lawton, 56 Barb. (N. Y.) 126.

Various rules have been formulated in elucidating this subject. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offence is to be committed are ordinarily too remote to satisfy the requirement. 1 Bish. Cr. Law, §§ 759, 762 (4) 763. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. 3 Am. & Ency. Law (2d ed.) 266, note 7. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent.

It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891. But after all that has been said, the application is difficult. One of the best known cases where acts of preparation were held insufficient is People *v.* Murray, 14 Cal. 159, which was an indictment for an attempt to contract an incestuous marriage. There the defendant had eloped with his niece with the avowed purpose of marrying her, and had taken measures to procure the attendance of a magistrate to perform the ceremony. In disposing of the case, Judge Field said: "Between preparations for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made." Mr. Bishop thinks this case is near the dividing line, and doubts if it will be followed by all courts. 1 Cr. Law, § 763 (3.) Mr. Wharton considers the holding an undue extension of the doctrine that preliminary preparations are insufficient. Cr. Law, 181, note. But the case has been cited with approval by courts of high standing. The exact inquiry presented by the case before us is whether the procurement of the means of committing the offence is to be treated as a preparation for the attempt, or as the attempt itself. In considering this question, it must be remembered that there are some acts, preparatory in their character, which the law treats as substantive offences: for instance, the procuring of tools for the purpose of counterfeiting, and of indecent prints with intent to publish them. Comments upon cases of this character may lead to confusion if not correctly apprehended. Wharton, Cr. Law, § 180, and note 1.

The case of Griffin *v.* The State, 26 Ga. 493, cited by the respondent, cannot be accepted as an authority in his favor. There the defendant was charged with attempting to break into a storehouse with intent to steal, by procuring an impression of the key to the lock and preparing from this impression a false key to fit the lock. The section of the Penal Code upon which the indictment was based provides for the indictment of any one who "shall attempt to commit an offence prohibited by law, and in such an attempt shall do any act toward the commission of such offence." The court considered that the General Assembly used the word "attempt" as synonymous with "intend," and that the object of the enactment was to punish "intents," if demonstrated by an act. The court cited Rex *v.* Sutton, 2 Str. 1074, as a strong authority in support of the indictment. There the prisoner was convicted for having in his possession iron stamps, with intent to impress the sceptre on sixpences. This was not an indictment for any attempt, but for the offence of possessing tools for counterfeiting with intent to use them. The Georgia court, by its construction of the statute, relieved itself from the distinction between "attempts" and crimes of procuring or possessing with unlawful intent.

The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

Exceptions sustained, judgment and verdict set aside, demurrer sustained, information held insufficient and quashed, and respondent discharged.

SECTION V.

A Specific Intent as Part of an Offence.

1 Hale P. C. 569. [Arson] must be a wilful and malicious burning, otherwise it is not felony, but only a trespass; and therefore if A. shoot unlawfully in a hand-gun, suppose it to be at the cattle or poultry of B. and the fire thereof sets another's house on fire, this is not felony, for though the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of *Dalt. Cap.* 105 p. 270.

But if A. have a malicious intent to burn the house of B., and in setting fire to it burns the house of B. and C. or the house of B. escapes by some accident, and the fire takes in the house of C. and burneth it, though A. did not intend to burn the house of C., yet in law it shall be said the malicious and wilful burning of the house of C. and he may be indicted for the malicious and wilful burning of the house of C. Co. P. C. p. 67.

DOBBS'S CASE.

Buckingham Assizes. 1770.

[*Reported* 2 *East, P. C.* 513.]

Joseph Dobbs was indicted for burglary in breaking and entering the stable of James Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B., there being. It appeared that the gelding was to have run for forty guineas, and that the prisoner cut the sinews of his fore-leg to prevent his running, in consequence of which he died.

Parker, C. B., ordered him to be acquitted; for his intention was not to commit the felony, by killing and destroying the horse, but a trespass only to prevent his running; and therefore no burglary.

But the prisoner was again indicted for killing the horse, and capitally convicted.

REX *v.* BOYCE.

Crown Case Reserved. 1824.

[*Reported* 1 *Moody*, 29.]

The prisoner was tried before Thomas Denman, Esq., Common Serjeant at the Old Bailey Sessions, June, 1824, upon an indictment for feloniously cutting and maiming John Fishburn, with intent to murder, maim, and disable.[1] There was no count which charged an intent to prevent his lawful apprehension.

The facts were these:

The prisoner had, in the night time, broken into a shop in Fleet Market, and was there discovered by the prosecutor, who was a watchman, at a quarter before five in the morning of the 11th of April, 1820. On the prosecutor entering the shop for the purpose of apprehending him, the prisoner struck him with his fist, which blow the prosecutor returned. The prisoner then said, "I will serve you out — I will do for you;" and, taking up a crow-bar, struck the prosecutor with it two severe blows, one on the head, the other on the arm; he then ran away, ordering the prosecutor to sit on a block in the shop, and threatening that it would be worse for him if he moved.

The crow-bar was a sharp instrument, and the prosecutor was cut and maimed by the blows so given with it by the prisoner.

The prisoner was found guilty; and, on an answer to a question from the Common Serjeant, the jury said, "We find that he was there with intent to commit a robbery, and that he cut and maimed the watchman with intent to disable him till he could effect his own escape."

The Common Serjeant reserved the above case for the consideration of the judges.

In Trinity Term, 1824, all the judges (except Graham, B. and Garrow, B.) met, and considered this case, and held the conviction wrong, for, by the finding of the jury, the prisoner intended only to produce a temporary disability till he could escape, not a permanent one.[2]

REX *v.* KELLY.

Monaghan Assizes, Ireland. 1832.

[*Reported* 1 *Crawford & Dix*, 186.]

Indictment for maliciously killing a horse. The evidence was that the prisoner had fired at the prosecutor, and killed his horse.

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[1] See 43 Geo. III. c. 58, § 1.

[2] *Acc.* Rex *v.* Duffin, Russ. & Ry. 365. — Ed.

Bushe, C. J. Under this Act[1] the offence must be proved to have been done maliciously, and malice implies intention. Here the proof negatives the intention of killing the horse. The prisoner must therefore be acquitted.[2]

REGINA *v.* SMITH.

Crown Case Reserved. 1856.

[*Reported Dears. C. C.* 559.]

The following case was stated for the opinion of the Court of Criminal Appeal by Mr. Justice Crompton.

The prisoner was convicted before me at the Winchester Summer Assizes, 1855, on an indictment charging him with wounding William Taylor with intent to murder him.

On the night in question the prisoner was posted as a sentry at Parkhurst, and the prosecutor, Taylor, was posted as a sentry at a neighbouring post.

The prisoner intended to murder one Maloney, and supposing Taylor to be Maloney, shot at and wounded Taylor.

The jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and the jury found that he intended to murder the individual he shot at supposing him to be Maloney.

I directed sentence of death to be recorded, reserving the question, whether the prisoner could be properly convicted on this state of facts of wounding Taylor with intent to murder him? See Rex *v.* Holt, 7 Car. & P. 518. See alro Rex *v.* Ryan, 2 Moo. & Rob. 213.

Charles Crompton.

This case was considered on 24th of November, 1855, by Jervis, C. J., Parke, B., Wightman, J., Crompton, J., and Willes, J.

No counsel appeared either for the Crown or for the prisoner.

Jervis, C. J. There is nothing in the objection. The conviction is good.

Parke, B. The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot.

The other learned Judges concurred.

Conviction affirmed.

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[1] 9 Geo. IV. c. 56, § 17.

[2] *Acc.* Com. *v.* Walden, 3 Cush. 558. — Ed.

REX *v.* WILLIAMS.

CROWN CASE REVERSED. 1790.

[*Reported* 1 *Leach C. C.* (4*th Ed.*) 529.]

ASHHURST, J.[1] Rhenwick Williams, the prisoner at the bar, was tried in last July Session on the statute of 6 Geo. I, c. 23, and the indictment charged, that he, on the 18th January 1790, at the parish of St. James, in a certain public street called St. James's-street, wilfully, maliciously, and feloniously did make an assault on Anne Porter, spinster, with intent wilfully and maliciously to tear, spoil, cut, and deface her garments; and that he, on that said 18th of January 1790, in the parish aforesaid, &c. did wilfully, maliciously, and feloniously tear, spoil, cut, and deface her silk gown, petticoat, and shift, being part of the wearing apparel which she then had and wore on her person. The Jury found the prisoner *guilty;* but the judgment was respited, and the case submitted to the consideration of the Judges upon three questions. A majority of the Judges are of opinion, upon all the questions, that this indictment is not well founded. . . . The Judges are of opinion, that the case, as proved, is not substantially within the meaning of the Act of Parliament. This statute was passed upon a particular and extraordinary occasion. Upon the introduction of Indian fashions into this country, the silk weavers, conceiving that it would be detrimental to their manufacture, made it a practice to tear and destroy the clothes and garments which were of a different commodity from that which they wove, and to prevent this practice the statute of 6 Geo. I, c. 23, was made. To bring a case therefore within this statute, the primary intention must be the tearing, spoiling, cutting, or defacing of the clothes; whereas, in the present case, the primary intention of the prisoner appears to have been the wounding of the person of the prosecutrix. The Legislature, at the time they passed this Act, did not look forward to the possibility of a crime of so diabolical a nature as that of wounding an unoffending person merely for the sake of wounding the person, without having received any provocation whatever from the party wounded. But even upon the supposition that it was possible for the Legislature to entertain an idea of such an offence, it is clear they did not intend to include it within the penalties of this statute, because, if they had entertained such an idea, it is probable they would have annexed to it a higher punishment than this statute inflicts. As the Legislature therefore could not have framed this statute to meet this offence, it does not fall within the province of those who are to expound the laws to usurp the office of the

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[1] Part of the opinion only is given. — ED.

Legislature, and to bring an offence within the meaning of an Act, merely because it is enormous, and deserving of the highest punishment. But although the lash of the Legislature does not reach this offence so as to inflict the consequences of felony on the offender, yet the wisdom of the Common Law opens a means of prosecution by indictment for the misdemeanor, and, on conviction of the offender, arms the Court with a power to punish the offence in a way that may force him to repent the temerity of so flagrant a violation of the rules of law, the precepts of social duty, and the feelings of humanity.[1]

STATE *v.* TAYLOR.

SUPREME COURT OF VERMONT. 1896.

[*Reported* 70 *Vt.* 1.]

INDICTMENT for an assault with intent to kill and murder. Trial by jury at the May Term, 1895, Windsor County, TAFT, J., presiding. Verdict and judgment of guilty, and sentence imposed at the respondent's request. The respondents excepted.

MUNSON, J.[2] The alleged assault was committed upon Paul Tinkham, constable of Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant on suspicion of felony. . . .

It is also objected that the respondents could not be convicted of more than a common assault without the finding of an actual intent to take life, and that the charge permitted the jury to return their verdict without finding this. It has been repeatedly held in cases not involving the matter of arrest that proof of a specific intent to kill is requisite. The intent is the body of the aggravated offence. If death results from an unlawful act, the offender may be guilty of murder, even though he did not intend to take life; but if the assault, however dangerous, is not fatal, the offender cannot be convicted of an assault with intent to kill unless the intent existed. An intent to take life may sometimes be presumed from the fact of killing, but when that fact does not exist the intent must be otherwise established. Any inference that may be drawn from the nature of the weapon and the manner of its use is an inference of fact to be drawn by the jury upon a consideration of these with the other circumstances of the case. 2 Bish. Crim. Law, § 741; Roberts *v.* People, 19 Mich. 401; Patterson *v.* State, 85 Ga. 131; 21 Am. St. 152.

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[1] It seems that BULLER, J., retained the opinion he had given the Jury, *viz.* that the case came within the statute, because the Jury, whose sole province it was to find the intent, had expressly found that the intent of the prisoner was to wound the party by cutting through her clothes, and therefore that he must have intended to cut her clothes; and for this opinion he relied upon the case of Cook and Woodburn, upon the statute 22 and 23 Car. II, c. 1, commonly called the Coventry Act, charging them in the words of the Act with an intention to maim a Mr. Crisp. The fact of maiming was clearly proved, but the defendants insisted that their intention was to murder him, and not to maim him, and therefore that they were not within the statute. But Lord King said that the intention was a matter of fact to be collected from the circumstances of the case, and as such was proper to be left to the Jury; and that if it was the intent of the prisoners to murder, it was to be considered whether the means made use of to accomplish that end and the consequences of those means were not likewise in their intention and design; and the Jury found them guilty and they were executed.— But it seems that upon a subsequent occasion WILLES, J., and EYRE, B., expressed some dissatisfaction with this determination, and thought, at least, that the construction ought not to be carried further. 1 East, 400 and 424.

[2] Only so much of the case as discusses the question of intent to kill is given.— ED.

Nor do we find any ground for holding otherwise when the assault is made in resisting arrest. Under an indictment framed like this, a respondent may be convicted of an assault with intent to kill, or an assault with intent to murder. State *v.* Reed, 40 Vt. 603. The grade of the assault will depend upon whether the crime would have been manslaughter or murder if death had ensued. But if the death had resulted from resisting an authorized arrest properly made, the crime would have been murder, regardless of the question of malice. So if the assault charged was committed in resisting such an arrest, and was found to have been made with intent to kill, it would have been an assault with intent to murder. But in the case of either assault there must have been the intent to take life. The elimination from the inquiry of malice as the distinguishing test between murder and manslaughter, and so between the two grades of assaults, does not eliminate the question of specific intent, which is an essential element even of the lower offence. The malice which the law infers from resistance to lawful arrest does not cover the intent to do a particular injury, and the question of intent must stand the same as in other cases.

So it becomes necessary to consider whether the matter of intent was properly submitted to the jury. The question was not entirely ignored by the court, but it was omitted from the general propositions submitted, and we think the charge as a whole could not fail to leave upon the minds of the jury an impression that if the circumstances of the arrest were such that the killing of the officer would have been murder, the assault was an assault with intent to murder. The attention of the jury was directed almost exclusively to the question of guilt as depending upon the legality of the arrest. They were nowhere distinctly told that unless the respondents were found to have made the assault with an intent to take life, they could be convicted of nothing but a common assault.

REX *v.* SHEPPARD.

CROWN CASE RESERVED. 1810.

[*Reported Russell & Ryan*, 169.]

THE prisoner was tried before Mr. Justice Heath, at the Old Bailey September sessions, in the year 1809, on an indictment consisting of four counts.

The first count charged the prisoner with forging a receipt for £19 16*s.* 6*d.*, purposing to be signed by W. S. West, for certain stock therein mentioned, with intent to defraud the governors and company of the Bank of England. The second count was for uttering the same knowing it to be forged, with the like intent. The third and fourth counts varied from the first and second in charging the intent to have been to defraud Richard Mordey.

It appeared in evidence at the trial that Richard Mordey gave £20 to his brother, Thomas Mordey, in the month of January, 1809, to buy stock in the five per cent Navy.

In February following Thomas Mordey gave the £20 to the prisoner for the purchase of the said stock, on the prisoner's delivering to him the receipt stated in the indictment.

The prisoner being examined at the bank, confessed that the receipt was a forgery, that there was no such person as W. S. West, whose signature appeared subscribed to the receipt, and that he, being pressed for money, forged that name, but had no intention of defrauding Richard Mordey.

Richard Mordey and Thomas Mordey swore they believed that the prisoner had no such intent.

On examining the bank books, no transaction corresponding with this could be found.

The learned judge told the jury that the prisoner was entitled to an acquittal on the first and second counts, because the receipt in question could not operate in fraud of the governor and company of the bank.

That as to the third and fourth counts, although the Mordeys swore that they did not believe the forgery to have been committed with an intent to defraud Richard Mordey; yet, as it was the necessary effect and consequence of the forgery, if the prisoner could not repay the money, it was sufficient evidence of the intent for them to convict the prisoner.

The jury acquitted the prisoner on the first and second counts, and found him guilty on the third and fourth counts; and the learned judge reserved this case for the opinion of the judges, to determine whether this direction to the jury was right and proper.

In Easter term, 31st of May, 1810, all the judges were present, and they were all of opinion that the conviction was right, that the immediate effect of the act was the defrauding of Richard Mordey of his money.

GORE'S CASE.

Crown Case Reserved. 1611.

[*Reported* 9 *Coke*, 81 *a*.]

Before **Fleming**, Chief Justice, and **Tanfield**, Chief Baron, Justices of Assize, this case happened in their western circuit. Agnes, the daughter of Roper, married one Gore; Gore fell sick; Roper, the father, in good-will to the said Gore his son-in-law went to one Dr. Gray, a physician, for his advice, who made a receipt directed to one Martin, his apothecary, for an electuary to be made, which the said Martin did and sent it to the said Gore; Agnes, the wife of Gore, secretly mixed ratsbane with the electuary, to the intent therewith to poison her husband, and afterward, 18 *Maii*, she gave part of it to her husband, who eat thereof and immediately became grievously sick; the same day Roper the father eat of it, and immediately also became sick; 19 *Maii* C. eat part of it, and he likewise fell sick; but they all recovered, and yet are alive. The said Roper, observing the operation of the said electuary, carried the said box with the said electuary 21 *Maii* to the said Gray the physician and informed him of the said accidents, who sent for the said Martin the apothecary and asked him if he had made the said electuary according to his direction, who answered that he had in all things but in one, which he had not in his shop, but put in another thing of the same operation, which the said Dr. Gray well approved of; whereupon Martin the apothecary said, "To the end you may know that I have not put anything in it which I myself will not eat, I will here before you eat part of it," and thereupon Martin took the box, and with his knife mingled and stirred together the said electuary, and took and eat part of it, of which he died the 22d day of May following. The question was, if upon all this matter Agnes had committed murder. And this case was delivered in writing to all the judges of England to have their opinions in the case; and the doubt was, because Martin himself of his own head, without incitation or procurement of any, not only eat of the said electuary, but he himself mingled and stirred it together, which mixing and stirring had so incorporated the poison with the electuary, that it made the operation more forcible than the mixture which the said Agnes had made; for notwithstanding the mixture which Agnes had made, those who eat of it were sick, but yet alive, but the mixture which Martin has made by mingling and stirring of it with his knife, made the operation of the poison more forcible and was the occasion of his death. And if this circumstance would make a difference between this case and Saunders's case in Plow. Com. 474 was the question.

And it was resolved by all the judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband with the event which thence ensued, — *sc.* the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause, and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death.

And it was also resolved that if A. puts poison into a pot of wine, &c., to the intent to poison B., and sets it in a place where he supposes B. will come and drink of it, and by accident C. (to whom A. has no malice) comes and of his own head takes the pot and drinks of it, of which poison he dies, it is murder in A., for the law couples the event with the intention, and the end with the cause; and in the same case if C. thinking that sugar is in the wine, stirs it with a knife and drinks of it, it will not alter the case; for the King by reason of the putting in of the poison with a murderous intent has lost a subject; and therefore in law he who so put in the poison with an ill and felonious intent shall answer for it. But if one prepares ratsbane to kill rats and mice, or other vermin, and leaves it in certain places to that purpose, and with no ill intent, and one finding it eats of it, it is not felony, because he who prepares the poison has no ill or felonious intent: but when one prepares poison with a felonious intent to kill any reasonable creature, whatsoever reasonable creature is thereby killed, he who has the ill and felonious intent shall be punished for it, for he is as great an offender as if his intent against the other person had taken effect. And if the law should not be such, this horrible and heinous offence would be unpunished; which would be mischievous and a great defect in the law.

REGINA *v.* PEMBLITON.

CROWN CASE RESERVED. 1874.

[*Reported* 12 *Cox C. C.* 607.]

CASE stated for the opinion of this court by the Recorder of Wolverhampton.

At the Quarter Sessions of the Peace held at Wolverhampton on the 8th day of January instant Henry Pembliton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham" contrary to the provision of the stat. 24 & 25 Vict. c. 97, s. 51. This section of the statute enacts: —

"Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding £5, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, he shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding five years, and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labor."

On the night of the 6th day of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk" kept by the prosecutor. About eleven o'clock P. M. the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from forty to fifty persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them, and removed to the other side of the street, where he picked up a large stone and threw it at the persons he had been fighting with. The stone passed over the heads of those persons, and struck a large plate-glass window in the prosecutor's house, and broke it, thereby doing damage to the extent of £7 12*s.* 9*d.*

The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window; and they returned a verdict of "guilty," whereupon I respited the sentence, and admitted the prisoner to bail, and pray the judgment of the Court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury, the prisoner was rightly convicted or not.

(Signed) JOHN J. POWELL,
Recorder of Wolverhampton.

No counsel appeared to argue for the prisoner.

J. Underhill, for the prosecution.[1]

LORD COLERIDGE, C. J. I am of opinion that this conviction must be quashed. The facts of the case are these. The prisoner and some other persons who had been drinking in a public-house were turned out of it at about eleven P. M. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone, and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate-glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone, coupled with the finding of the jury, will do. Now I think that is not enough. The indictment is framed under the 24 & 25 Vict. c. 97, s. 51. The Act is an Act relating to malicious injuries to property, and section 51 enacts that whosoever shall unlawfully and maliciously commit any damage, &c., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the 58th section which deserves attention. "Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me on both these sections that what was intended to be provided against by the Act is the wilfully doing an unlawful act, and that the act must be wilfully and intentionally done on the part of the person doing it, to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with, intending to strike them and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited, and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offence created by an Act in which the words are carefully studied.

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[1] The argument is omitted.

Blackburn, J. I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding £5, shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is, Can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window? I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think therefore that the conviction must be quashed.

Pigott, B. I am of the same opinion.

Lush, J. I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window, or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

Cleasby, B., concurred. *Conviction quashed.*

REGINA *v.* FAULKNER.

Crown Case Reserved, Ireland. 1877.

[*Reported* 13 *Cox C. C.* 550.]

Case reserved by Lawson, J., at the Cork Summer Assizes, 1876. The prisoner was indicted for setting fire to the ship "Zemindar," on the high seas, on the 26th day of June, 1876. The indictment was as follows: "That Robert Faulkner, on the 26th day of June, 1876, on board a certain ship called the 'Zemindar,' the property of Sandback, Tenne, and Co., on a certain voyage on the high seas, then being on the high seas, feloniously, unlawfully, and maliciously, did set fire to the said ship 'with intent thereby to prejudice the said' (these words were struck out at the trial by the learned judge, and the following words inserted, 'called the "Zemindar," the property of') Sandback, Tenne, and Co., and that the said Robert Faulkner, on the day and year aforesaid, on board a certain ship called the 'Zemindar,' being the property of Sandback, Parker, and other, on a certain voyage on the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously, did set fire to the said ship, with intent thereby to prejudice the said Sandback, Parker, and other, the owners of certain goods and chattels then laden, and being on board said ship." It was proved that the "Zemindar" was on her voyage home with a cargo of rum, sugar, and cotton, worth £50,000. That the prisoner was a seaman on board, that he went into the forecastle hold, opened the sliding door in the bulkhead, and so got into the hold where the rum was stored; he had no business there, and no authority to go there, and went for the purpose of stealing some rum; that he bored a hole in the cask with a gimlet; that the rum ran out; that when trying to put a spile in the hole out of which the rum was running he had a lighted match in his hand; that the rum caught fire; that the prisoner himself was burned on the arms and neck; and that the ship caught fire and was completely destroyed. At the close of the case for the Crown, counsel for the prisoner asked for a direction of an acquittal on the ground that on the facts proved the indictment was not sustained, nor the allegation that the prisoner had unlawfully and maliciously set fire to the ship proved. The Crown contended that inasmuch as the prisoner was at the time engaged in the commission of a felony, the indictment was sustained, and the allegation of the intent was immaterial.

At the second hearing of the case, before the Court for Crown Cases Reserved, the learned judge made the addition of the following paragraph to the case stated by him for the court.

"It was conceded that the prisoner had no actual intention of burning the vessel, and I was not asked to leave any question to the jury as to the prisoner's knowing the probable consequences of his act, or as to his reckless conduct."

The learned judge told the jury that although the prisoner had no actual intention of burning the vessel, still if they found he was engaged in stealing the rum, and that the fire took place in the manner above stated, they ought to find him guilty. The jury found the prisoner guilty on both counts, and he was sentenced to seven years' penal servitude. The question for the court was whether the direction of the learned judge was right; if not, the conviction should be quashed.[1]

Peter O'Brien, for the prisoner.

The *Attorney General* (May), with him *Green*, Q. C., for the Crown.[2]

O'Brien, J.[3] I am also of opinion that the conviction should be quashed, and I was of that opinion before the case for our consideration was amended by my brother Lawson. I had inferred from the original case that his direction to the jury was to the effect now expressly stated by amendment, and that, at the trial, the Crown's counsel conceded that the prisoner had no intention of burning the vessel, or of igniting the rum; and raised no questions as to prisoner's imagining or having any ground for supposing that the fire would be the result or consequence of his act in stealing the rum. With respect to Reg. *v.* Pembliton, 12 Cox C. C. 607, it appears to me there were much stronger grounds in that case for upholding the conviction than exist in the case before us. In that case the breaking of the window was the act of the prisoner. He threw the stone that broke it; he threw it with the unlawful intent of striking some one of the crowd about, and the breaking of the window was the direct and immediate result of his act. And yet the court unanimously quashed the conviction upon the ground that, although the prisoner threw the stone intending to strike some one or more persons, he did not intend to break the window. The courts above have intimated their opinion that if the jury, upon a question to that effect being left to them, had found that the prisoner, knowing the window was there, might have reasonably expected that the result of his act would be the breaking of the window, that then the conviction should be upheld. During the argument of this case the Crown counsel required us to assume that the jury found their verdict upon the ground that in their opinion the prisoner may have expected that the fire would be the consequence of his act in stealing the rum, but nevertheless did the act recklessly, not caring whether the fire took place or not. But at the trial there was not even a suggestion of any such ground, and we cannot assume that the jury formed an opinion which there was no evidence to sustain, and which would be altogether inconsistent with the circumstances under which the fire took place. The reasonable inference from the evidence is that the prisoner lighted the match for the purpose of putting the spile in the hole to stop the further running of the rum, and that while he was attempting to do so, the rum came in contact with the lighted match and took fire. The recent case of Reg. *v.* Welch, 13 Cox C. C. 121, has been also referred to, and has been relied on by the Crown counsel on the ground that, though the jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare that had died from the injury inflicted by the prisoner, the prisoner was, nevertheless, convicted on an indictment charging him with having unlawfully and maliciously killed, maimed, or wounded the mare, and such conviction was upheld by the court. But on referring to the circumstances of that case it will be seen that the decision in it does not in any way conflict with that in the previous case of Reg. *v.* Pembliton, and furnishes no ground for sustaining the present conviction. Mr. Justice Lindley, who tried that subsequent case, appears to have acted in accordance with the opinion expressed by the judges in Reg. *v.* Pembliton. Besides leaving to the jury the question of prisoner's intent, he also left them a second question, namely, whether the prisoner, when he did the act complained of, knew that what he was doing would or might kill, maim, or wound the mare, and nevertheless did the act recklessly, and not caring whether the mare was injured or not. The jury answered that second question in the affirmative. Their finding was clearly warranted by the evidence, and the conviction was properly affirmed. By those two questions a distinction was taken between the case of an act done by a party with the actual intent to cause the injury inflicted, and the case of an act done by a party knowing or believing that it would or might cause such injury, but reckless of the result whether it did or did not. In the case now before us there was no ground whatever for submitting to the jury any question as to the prisoner believing or supposing that the stealing of the rum would be attended with a result so accidental and so dangerous to himself

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[1] 24 & 25 Vict. c. 97, s. 42, "Whoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel . . . shall be guilty of felony."

[2] Arguments of counsel are omitted.

[3] Concurring opinions of Barry and Fitzgerald, JJ., and Fitzgerald, B., and the dissenting opinion of Keogh, J. are omitted. Dowse and Deasy, BB., and Lawson, J. also concurred. — Ed.

During the argument doubts were suggested as to the soundness of the decision in Reg. *v.* Pembliton; but in my opinion that case was rightly decided, and should be followed. Its authority was not questioned in Reg. *v.* Welch, in which the judges who constituted the court were different from those who had decided Reg. *v.* Pembliton, with the exception of Lord Coleridge, who delivered the judgments of the court on both occasions.

Palles, C. B. I concur in the opinion of the majority of the court, and I do so for the reasons already stated by my brother Fitzgerald. I agree with my brother Keogh that from the facts proved the inference might have been legitimately drawn that the setting fire to the ship was malicious within the meaning of the 24 & 25 Vict. c. 97. I am of opinion that that inference was one of fact for the jury, and not a conclusion of law at which we can arrive upon the case before us. There is one fact from which, if found, that inference would, in my opinion, have arisen as matter of law, as that the setting fire to the ship was the probable result of the prisoner's act in having a lighted match in the place in question; and if that had been found I should have concurred in the conclusion at which Mr. Justice Keogh has arrived. In my judgment the law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the *corpus delicti* which actually ensues. In my opinion this inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct is reckless or the reverse. This much I have deemed it right to say to prevent misconception as the grounds upon which my opinion is based. I wish to add one word as to Reg. *v.* Pembliton, 12 Cox C. C. 607. In my opinion the learned judges who were parties to that decision never intended to decide, and did not decide, anything contrary to the views I have expressed. That they did not deem actual intention, as distinguished from implied intention, essential is shown by the subsequent case of Reg. *v.* Welch, in which an indictment under the 40th section of the same Act was upheld, although actual intention was negatived by the jury. The facts found in answer to the second question in that case cannot have been relied upon as evidence of actual intention. As evidence they would have been valueless in face of the finding negativing the fact which in this view they would have but tended to prove. Their value was to indicate a state of facts in which intention was imputed by an irrefutable inference of law. It was not germane to the actual decisions in Reg. *v.* Pembliton and Reg. *v.* Welch to determine whether the state of facts from which this inference of law arises is that suggested in the first case and acted upon by the second, or the circumstance of one act being the natural consequence of the other. Some of the learned judges, no doubt, during the arguments and in their judgments in the first case indicate a state of facts from which this inference would arise. They do not decide that the same inference might not arise in the other state of facts to which I have alluded. If, contrary to my own view of that case, it shall be held to involve that intention to do that which is a necessary consequence of a wrongful act wilfully committed is not an inference irrefutable as matter of law, I must say, with unfeigned deference, that I shall hold myself free hereafter to decline to follow it. The Lord Chief Justice of the Common Pleas, who, in consequence of illness, has been unable to preside to-day, has authorized me to state that he considers that the case before us is concluded by Reg. *v.* Pembliton.

Conviction quashed.

REGINA *v.* LATIMER.

CROWN CASE RESERVED. 1886.

[*Reported* 16 *Cox C. C.* 70.]

CASE stated by the learned Recorder for the borough of Devonport as follows: —

The prisoner was tried at the April Quarter Sessions for the borough of Devonport on the 10th day of April, 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public-house in Devonport; that on Sunday, the 14th day of February, 1886, the prisoner, who was a soldier, and a man named Horace Chapple were in the public-house, and a quarrel took place, and eventually the prisoner was knocked down by the man Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting, having in his hand his belt which he had taken off. As the prisoner passed he aimed a blow with his belt at the said Horace Chapple, and struck him slightly; the belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: 1. Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment, and admitted the prisoner to bail, to come up for judgment at the next sessions.

The question for the consideration of the court was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted.

By sect. 20 of 24 & 25 Vict. c. 100, it is enacted that, "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanor."

Croft for the prisoner.[1]

Helpman, for the prosecution, was not called upon.

Lord Coleridge, C. J. I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that, if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice; and is guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were *res integra;* but it is not *res integra* because, in Reg. *v.* Hunt, a man in attempting to injure A. stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of Reg. *v.* Pembliton. But I observe that, in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by sect. 18 of the statute 24 & 25 Vict. c. 100, it is enacted that: "Whosoever shall unlawfully and maliciously by any means whatsoever wound . . . any person . . . with intent . . . to maim, disfigure, or disable any person . . . shall be guilty of felony;" and then sect. 20 enacts that "whosoever shall unlawfully and maliciously wound . . . any other person . . . shall be guilty of a misdemeanor;" and be liable to certain punishments. Therefore, the language of the 18th and 20th sections are perfectly different; and it must be remembered that this is a conviction for an offence under the 20th section. Now, the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute of 9 Geo. 4, c. 31, where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I cannot see that there could be any question, but for the case of Reg. *v* Pembliton. Now, I think that that case was properly decided; but upon a ground which renders it clearly distinguishable from the present case. That is to say, the statute which was under discussion in Reg. *v.* Pembliton makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offence to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.

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[1] The argument is omitted.

LORD ESHER, M. R. I am of the same opinion. It seems to me that the case of Reg. *v.* Pembliton is the only case which could be cited against a well-known principle of law. But that case shows that there was no intention to injure any property at all; therefore there was no intent to commit the crime mentioned in the Act.

BOWEN, L. J. I am also of opinion that this conviction should be affirmed. It is quite clear that this offence was committed without any malice in the mind of the prisoner, and that he had no intention of wounding Ellen Rolston. The only difficulty that arises is from Reg. *v.* Pembliton, which was a case under an Act of Parliament which does not deal with all malice in general, but with malice towards property; and all that case holds is, that though the prisoner would have been guilty of acting maliciously within the common law meaning of the term, still he was not guilty of acting maliciously within the meaning of a statute which requires a malicious intent to injure property. Had the prisoner meant to strike a pane of glass, and without any reasonable expectation of doing so injured a person, it might be said that the malicious intent to injure property was not enough to sustain a prosecution under this statute. But, as the jury found that the prisoner intended to wound Chapple, I am of opinion that he acted maliciously within the meaning of this statute.

FIELD, J. I am also of opinion that this conviction must be affirmed. I think this a very important case and one of very wide application, and am very glad that it has come before this court, and has been carefully considered and decided so that there may be no doubt about the matter.

MANISTY, J. I do not propose to add more than a few words. The facts in this case raise an exceedingly important question, because the man Chapple, who was intended to be struck, was standing close by the woman who was wounded, and who was talking to him; and the prisoner intending to strike Chapple with the belt did strike him, but the belt bounded off and struck Ellen Rolston. It seems to me that the first and second findings of the jury justify the conviction, because they are in these terms: "The jury found that the blow was unlawful and malicious, and that it did in fact wound Ellen Rolston;" and that being so, I think that the third finding does not entitle the prisoner to an acquittal. It is true he did not intend to strike Ellen Rolston, but he did intend to strike Chapple, and in doing so wounded Ellen Rolston; therefore I think that the third finding is quite immaterial, and this conviction should be affirmed.[1]

Conviction affirmed.

REX *v.* KNIGHT.

CROWN CASE RESERVED. 1782.

[*Reported 2 East, Pleas of the Crown,* 510.]

THE prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Mary Snelling at East Grinstead, in the night of November 14, 1781, with intent to steal the goods of Leonard Hawkins, then and there being in the said dwelling-house. It appeared that L. Hawkins, being an excise officer, had seized seventeen bags of tea on the same month at a Mrs. Tilt's, in a shop entered in the name of Smith, as being there without a legal permit, and had removed the same to Mrs. Snelling's at East Grinstead, where Hawkins lodged. The tea, the witnesses said, they supposed to belong to Smith; and that on the night of November 14 the prisoners and divers other persons broke open the house of Mary Snelling with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses swore that they supposed the fact was committed either in company with or by the procurement of Smith. The jury were directed to find the prisoners guilty, on the point being reserved; and being also directed to find as a fact with what intent the prisoners broke and entered the house, they found that they intended to take the goods on the behalf of Smith. In Easter term following all the judges held that the indictment was not supported, there being no intention to steal, however outrageous the behavior of the prisoners was in thus endeavoring to get back the goods for Smith.[2]

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[1] See *acc.* (wounding with intent to do bodily harm) Reg. *v.* Lynch, 1 Cox C. C. 361; Reg. *v* Stofford, 11 Cox C. C. 643; (with intent to kill) Reg. *v.* Smith, 7 Cox C. C. 51. — ED.

[2] *Acc.* Com. *v.* Newell, 7 Mass. 245. — ED.

SECTION VI.

Jurisdiction over an Offence.

UNITED STATES *v.* DAVIS.

U. S. CIRCUIT COURT, DISTRICT OF MASSACHUSETTS. 1837.

[*Reported* 2 *Sumner,* 482.]

INDICTMENT for manslaughter. It appeared that the defendant, master of an American whale ship, shot and killed a man on the deck of another vessel which lay alongside; both vessels lay at the time in a harbor of one of the Society Islands.[1]

STORY, J. We are of opinion that, under the circumstances established in evidence, there is no jurisdiction in this cause.

What we found ourselves upon in this case is, that the offence, if any, was committed, not on board of the American ship "Rose," but on board of a foreign schooner belonging to inhabitants of the Society Islands, and, of course, under the territorial government of the king of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for although the gun was fired from the ship "Rose," the shot took effect and the death happened on board of the schooner; and the act was, in contemplation of law, done where the shot took effect. So the law was settled in the case of Rex *v.* Coombs, 1 Leach Cr Cas. 432, where a person on the high seas was killed by a shot fired by a person on shore, and the offence was held to be committed on the high seas, and to be within the Admiralty jurisdiction. Of offences committed on the high seas on board of foreign vessels (not being a piratical vessel), but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the Act of 1790, ch. 36, § 12. That was the doctrine of the Supreme Court in United States *v.* Palmer, 3 Wheat. R. 610, and United States *v.* Klintock, 5 Wheat. R. 144, and United States *v.* Holmes, 5 Wheat. R. 412; applied, it is true, to another class of cases, but in its scope embracing the present. We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen. We decide the case wholly on the ground that the schooner was a foreign vessel belonging to foreigners, and at the time under the acknowledged jurisdiction of a foreign government. We think that under such circumstances the jurisdiction over the offence belonged to the foreign government, and not to the courts of the United States under the Act of Congress.

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[1] This short statement of facts has been substituted for that contained in the report.

The jury immediately returned a verdict of not guilty.

STATE *v.* GESSERT.

SUPREME COURT OF MINNESOTA. 1875.

[*Reported* 21 *Minnesota*, 369.]

BERRY, J. The indictment in this case was found by a grand jury of Washington County, and charges the defendant with committing the crime of murder, by feloniously, &c., inflicting upon David Savazyo, on Aug. 28, 1874, in said county, a stab and wound, of which, upon the same day, Savazyo died in the county of Pierce, and State of Wisconsin. The question in the case is whether the indictment charges the commission of an offence in the county of Washington. It is for his acts that defendant is responsible. They constitute his offence. The place where they are committed must be the place where his offence is committed, and therefore the place where he should be indicted and tried. In this instance the acts with which defendant is charged, to wit, the stabbing and wounding, were committed in Washington County. The death which ensued in Pierce County, though it went to characterize the acts committed in Washington County, was not an act of defendant committed in Wisconsin, but the consequence of his acts committed in Washington County, against the peace and dignity of the State of Minnesota. We are therefore of opinion that the indictment charges the commission of the crime of murder in Washington County, and, upon the questions certified to this court by the court below, that the demurrer to the indictment should be overruled. Riley *v.* State, 9 Humph. 646; Com. *v.* Parker, 2 Pick. 550, 559; 1 East, P. C. c. 5, § 128; Rex *v.* Burdett, 4 B. & Ald. 95, 173; Grosvenor *v.* Inhabitants, &c., 12 East, 244; People *v.* Gill, 6 Cal. 637; State *v.* Carter, 3 Dutch. 499; 1 Hale P. C. c 33; 1 Bish. Cr. Law, § 83; 1 Bish. Cr. Proc. § 67; 2 Wharton Cr. Law, § 1052.[1]

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[1] *Acc.* Green *v.* State, 66 Ala. 40; U. S. *v.* Guiteau, 1 Mack. 498. See also the following cases for decision upon the locality of crime: Allison *v.* Com., 83 Ky. 254 (receiving stolen goods); People *v.* Arnold, 46 Mich. 268 (conspiracy); Lovelace *v.* State, 12 Lea, 721 (embezzlement). — ED.

REGINA *v.* ARMSTRONG.

LIVERPOOL ASSIZES. 1875.

[*Reported* 13 *Cox C. C.* 184.]

JOHN ARMSTRONG was charged with the wilful murder of Lawrence Harrington, on board the hulk *Kent*, in the Bonny River, Africa, on the 4th of May, 1875.[1] . . .

It was proved in evidence that the *Kent* had been a three-masted sailing ship, of 1324 tons register, and was registered as a British ship, though not British built. That she had for eighteen months at least been dismasted, and employed as a floating depôt or receiving ship on the Bonny Station for a line of commercial steamers trading between Liverpool and that port; that she swung with the tide and floated in the tideway of the river, and that she hoisted the British ensign at the peak. The general appointments as a ship, boats, etc., remained; the masts had been cut down to form a support for an awning or house on deck. but the rigging had been taken away. The prisoner was mate of the *Kent*, and in the evening of the 4th day of May he stealthily approached the captain as he was standing near the stern and leaning over the taffrail of the ship, and took hold of him by the collar of his coat and the seat of his trousers and flung him overboard. The body of the captain in falling struck the quarter rail or gallery of the *Kent*, and bounded off; and the back of his head, as was deposed by one witness, then struck the gunwale of a boat that was lying moored on the port side, leaving marks of blood. The body then fell into the water, and was never seen again, though five or six boats were immediately put out in search. The river was running out very rapidly, at the rate of four to five knots an hour. It was at this point six or seven miles broad, and the nearest ship was probably a thousand yards distant. The station of the ship was at about seven miles from the bar, one and a half miles from the easterly or southern shore, and more than five from the northern shore. One of the witnesses said the river was infested with sharks, and that bathing was forbidden on that account, but admitted in cross-examination he had never seen any.

Cottingham, for the prisoner, submitted . . . that the murder, if murder it were, was not committed on board the *Kent*, and was not a completed criminal act on board that ship. That at the utmost there had only been an assault on board the ship, and that the ultimate consequence of the act, where it was only a possible consequence, could not be assumed to have occurred on board the ship. . . .

HIS LORDSHIP [ARCHIBALD, J.] overruled all the objections, and pointed out that there was abundant *primâ facie* evidence that the ship was a British ship, and that this had not been rebutted; that the crime had been committed on board a British ship, and on the high seas, and that it was not necessary that the act should have been completed on board, as it was a direct consequence of the felonious assault.

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[1] Only so much of the case as discusses the question of jurisdiction is given. — ED.

The jury found the prisoner guilty of manslaughter, and he was sentenced to twenty years penal servitude.

JACKSON *v.* COMMONWEALTH.

COURT OF APPEALS OF KENTUCKY. 1897.

[*Reported* 100 *Ky.* 239.]

THE defendant and one Walling were indicted for the murder of Pearl Bryan in Campbell County, Kentucky. The evidence indicated that the two persons accused had attempted to kill the deceased by giving her poison in Ohio; that she became unconscious, and was believed by them to be dead; that they brought her across the Ohio River into Kentucky, and there cut off her head, and thus caused her death. The court at the trial charged: "If the jury believe from all the evidence beyond a reasonable doubt that the defendant, Scott Jackson, wilfully, feloniously, and with malice aforethought, himself attempted or aided or abetted or procured another to attempt to kill Pearl Bryan, but she was not thereby killed, and that said Scott Jackson, in this county and State, before the 14th day of February, 1896, though believing said Pearl Bryan was then dead, for whatever purpose, cut her throat with a knife or other sharp instrument so that she did then and there, and because thereof die, they will find said Scott Jackson guilty of murder."

On appeal this charge was held to be correct. The defendant moved for a rehearing.[1]

DU RELLE, J. With great earnestness, force and plausibility two contentions are made by the petitions for rehearing in this case and in the case of Walling *v.* Commonwealth:

1st. That no facts which occurred in the foreign jurisdiction of Ohio can be tacked on to facts which occurred in Kentucky for the purpose of supplying the elements necessary to constitute the crime of murder in Kentucky.

2d. (And this appears to be the point chiefly relied on) That in giving its instructions to the jury the trial court is not authorized to refer to any fact which occurred in the foreign jurisdiction. Other suggestions are made in the petitions, but in our judgment do not require specific response.

These two contentions may be considered together, as the first is necessarily raised and considered in the decision of the second, and so treated in the petition.

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[1] This short statement of the facts upon which the petition for a rehearing is based is abridged from the opinion given after the first argument. — ED.

Reduced to its lowest terms, the claim of counsel is that an attempt to commit a murder in another State, supposed by the guilty party to have been there successful, but in reality completed in this State, though by an act not by him believed to be the consummation of his purpose, is not in this State punishable.

Such is not nor should it be the law. By the law of this State a crime is punishable in the jurisdiction in which it has effect. Statutes in numbers have been passed by the general assembly of this Commonwealth providing that jurisdiction should be had of crimes in the county in which the crime became effectual. (Chapter 36, article 2, Kentucky Statutes.) Such we believe to have been the common law before such enactments.

Assuming that what the jury found was true, in what State or district could the crime be punished? If not here, where? If we concede the claims of counsel for appellants no serious crime was committed in Ohio. Nothing was there done but an ineffective attempt to murder. None was committed there. What was done in this jurisdiction was only the mutilation of a supposed corpse, and yet the fact, established by overwhelming testimony, remains that the crime has been committed. Not all the refinements of counsel can lead us from the conclusion that, when a crime has been completed the result of which is a death in this Commonwealth, we can take jurisdiction of the offence.

Not for a moment can we admit as law the logical conclusion of counsel's argument, namely, that there is a variety of murder, which, by reason of error in its commission, is not anywhere in any jurisdiction punishable; not in Ohio, for the reason that the attempt there made was not successful; not in Kentucky, for the reason that the act there done, and which accomplished and completed the actual killing, was done upon the supposition that the murder had already been accomplished.

One reliance of the defence upon petition for rehearing is that the indictment charges murder by cutting the throat or decapitation, and that the instructions permit and require the jury to consider a previous attempt to kill in a foreign State and by different means. But in our opinion it was not error in the instructions to present to the jury evidential facts which, if found to be true, showed the criminal nature of the act by which the offence was completed.

We see no good reason why we should not consider the motive which inspired an attempted crime in another sovereignty, and the circumstances of the attempt, with the view to determine the character, criminal or not, of the ultimate fact which took place in this sovereignty; nor is such a determination an invasion of the constitutional right of the accused to a speedy "public trial by an impartial jury of the vicinage." For the accused himself selected the vicinage in which the final act occurred, and thus himself gave jurisdiction to the court which determined the criminal character of that act. Nor can we consider as serious the contention that the ruling of the trial court, approved by the opinion in this case, is punishment in Kentucky of an offence committed in another jurisdiction, and there again punishable, so as to come within the constitutional inhibition against a citizen being twice put in jeopardy. On counsel's own contention no completed crime existed in Ohio, and the crime committed, if punishable under this State's law, can not further or again be punished there. ...

We have carefully examined the immense mass of testimony in the case, and see no error to the prejudice of any substantial right of the appellant.

The petition for rehearing is overruled.

STATE *v.* WYCKOFF.

SUPREME COURT OF NEW JERSEY. 1864.

[*Reported* 2 *Vroom*, 65.]

BEASLEY, C. J. The defendant was convicted before the Court of Oyer and Terminer, on an indictment containing two counts, the first of which charges him with the larceny of certain goods of a value exceeding twenty dollars, and the other with receiving goods knowing them to be stolen.

It appeared that the defendant was in New York at the time of the theft, and while in that state he made an arrangement with one Kelly to come into this state and steal the articles in question and to bring and deliver them to him in New York. This arrangement was carried into effect, — the articles being stolen by Kelly and delivered to the defendant in New York. The defendant was not in this state at any time, from the inception to the conclusion of the transaction. The Court of Oyer and Terminer have asked the advisory opinion of this court upon two points : —

First. Whether proof of the above stated facts will support the indictment.

Second. Has the defendant committed any offence indictable by the laws of this state?

In regard to the first point, the circumstances proved on the trial established the fact that Kelly was guilty of the crime of grand larceny in this state. Kelly therefore committed a felony, and consequently, as the defendant was not present, either actually or constructively, at the commission of the offence, he could not be a principal therein, but was an accessory before the fact. Kelly did the act, and the defendant's will contributed to it; but it was committed while he was too far from the act to constitute him a principal. The distinction in felonies between the principal and accessories before and after the fact is certainly technical, and has been sometimes regarded as untenable; but it is too firmly established to be exploded by judicial authority. It has always been regarded, in its essential features, as a part of the criminal law of this state, and its existence is recognized both in our statutes and in a number of the reported decisions. State *v.* Cooper, 1 Green, 373; Johnson *v.* State, 2 Dutcher, 324; Cook *v.* State, 4 Zab. 845.

The first count, therefore, charging the defendant as a principal in the larceny, is not sustained by the evidence. The crime of the accessory, being dissimilar from that of the principal in its fundamental characteristics, must be distinctly charged in the pleadings. It has never been supposed that a count containing a statement of facts evincive of the fault of the party accused as a principal in a felony, was sufficient to warrant the conviction of such party as an accessory. 1 Chit. Crim. Law, 271, 2 id. 4; Wharton's Prec. of Indict. 97; State *v.* Seran, 4 Dutcher, 519. In the case of Rex *v.* Plant, 7 C. & P. 575, it was expressly held that one indicted as principal in a felony could not be convicted of being an accessory before the fact. See also Whart. C. L. 115.

Neither will the second count of the indictment sustain the conviction. The evidence shows that the stolen goods were received by the defendant, with guilty knowledge, in the state of New York. But this was no offence against the laws of this State. The defendant therefore cannot be legally sentenced upon the conviction founded on the present indictment.

The remaining question is, has the defendant committed any offence indictable by the laws of this State?

His act was to incite and procure his agent or accomplice to enter this state and commit the felony. If the defendant had been in this state at the time of such procurement and incitement, he would have been guilty as an accessory before the fact; but what he did was done out of the state. Did he thereby become amenable to our criminal jurisdiction?

As the defendant did not act within this state in his own person, the point to be decided is, did he do such act in this state by construction or in contemplation of law?

It is undoubtedly true that personal presence within the jurisdiction in which the crime is committed, is not in all cases requisite to confer cognizance over the person of the offender, in the tribunals of the government whose laws are violated. In some cases the maxim applies, *Crimen trahit personam.* Thus, where a person being within one jurisdiction, maliciously fires a shot which kills a man in another jurisdiction, it is murder in the latter jurisdiction, the illegal act being there consummated. So, in the case of The United States *v.* Davis, 4 Sumner, 485, the defendant was accused of shooting from an American ship and killing a man on board a foreign schooner. Chief Justice Story said: "The act was, in contemplation of law, done where the shot took effect. He would be liable to be punished by the foreign government." The same principle was recognized by this court in the case of The State *v.* Carter, 3 Dutcher, 499. So, when a crime is committed by an innocent living agent, the projector of such crime being absent from the country whose laws are infringed. Such was the case of The People *v.* Adams, 3 Denio, 190. In this latter case the facts were these: The defendant was indicted in the city of New York for obtaining money from a firm of commission merchants in that city by the exhibition of fictitious receipts. The defendant pleaded that he had never been in the State of New York; that the receipts were drawn and signed in Ohio, and that the offence was committed by their being presented to the firm in New York by innocent agents employed by the defendant in Ohio. It was held that such plea was bad and disclosed no defence. A number of authorities maintaining the same view will be found collected in the opinion of the judge who delivered the decision of the court in the case last cited.

The rule, therefore, appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime, but no responsible criminal.

But the more difficult question remains to be considered, which is, — in case of a felony committed here by a responsible agent, who is therefore the principal felon, and punishable by our laws, — can the procurer, who is an accessory before the fact, and whose acts of procurement have been done in a foreign jurisdiction, be indicted and punished for such procurement in this state?

The general rule of the law has always been that a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such act shall have been done in such place, but it is the completed act alone which gives jurisdiction. So far has this strictness been pushed that it has been uniformly held that if a felony was committed in one county, the accessory having incited the principal in another county, such accessory could not be indicted in either. This technicality, which, when applied to the several counties of the same kingdom or state, appears to have little to recommend it, was nevertheless so firmly established that it required the statute of 2 and 3 Ed. VI. c. 24,[1] to abolish it, and this statute has been re-enacted in this state. Nix. Dig. 199 (Rev. p. 282, § 78). And so in like manner the same rigor existed in cases in which death ensued out of the kingdom from a felonious stroke inflicted within it, it being decided that neither the principal nor accessory was, under such circumstances, indictable. This imperfection in the criminal system was removed by the statute of 2 Geo. II. c. 21, and which has been substantially copied in the third section of the act of this State before referred to in Nix. Dig. 200 (Rev. p. 282, § 78). For the rules of law which were thus modified by statute, see 3 Inst. 48 ; Lacye's Case, 1 Leo. 270 ; 2 Rep. 93.

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[1] "Where any murder or felony hereafter shall be committed and done in one county, and another person or mo shall be accessory or accessories in any manner of wise to any such murder or felony in any other county, that then an indictment found

If, then, the accessory by the common law was answerable only in the county in which he enticed the principal, and that, too, when the criminal act was consummated in the same county, it would seem to follow necessarily, in the absence of all statutory provision, that he is wholly dispunishable when the enticement to the commission of the offence has taken place out of the state in which the felony has been perpetrated. Under such a condition of affairs it is not easy to see how the accessory has brought himself within the reach of the laws of the offended state. His offence consists in the enticement to commit the crime ; and that enticement, and all parts of it, took place in a foreign jurisdiction. As the instrumentality employed was a conscious guilty agent, with free will to act or to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer. Applying to the facts of this case the general and recognized principles of law, it would seem to be clear that the offence of which the defendant has been guilty is not such as the laws of this state can take cognizance of. We must be satisfied to redress the wrong which has been done to one of our citizens, and to vindicate the dignity of our laws by the punishment of the wrong-doer who came within our territorial limits. As for the defendant, who has never been, either in fact or by legal intendment, within our jurisdiction, he can be only punished by the authority of the State of New York, to whose sovereignty alone he was subject at the time he perpetrated the crime in question.

The principal involved in this case has not often been the subject of judicial consideration, nor has it received much attention from the text-writers. But in the few cases to be found in the reports upon the point a view similar to the above has been expressed. The case of The State *v.* Moore, 6 Foster, 448, was, in all its features, identical with that now before this court, and the result was a discharge of the prisoner, on the ground that the crime of the accessory had not been committed within the jurisdiction of New Hampshire.

The case *Ex parte* Smith, 6 Law Reporter, 57, was to the same

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or taken against such accessory and accessories upon the circumstance of such matter before the justices of the peace, or other justices or commissioners to enquire of felonies in the county where such offences of accessory or accessories in any manner of wise shall be committed or done, shall be as good and effectual in the law as if the said principal offence had been committed or done within the same county where the same indictment against such accessory shall be found." 2 & 3 Ed. 6, c. 24, § 4. — ED.

effect. The same principle was again considered, though in a somewhat different aspect, in the case of The State *v.* Knight, 1 Taylor's Rep. (N. C.) 65, and the opinion intimated by the court entirely accorded with those expressed in the two cases first above cited. These are the only judicial examinations of the matter now in hand which I have met with in the course of my research.

Upon authority, then, as well as upon principle, I think the present indictment cannot be sustained, and that the defendant has not committed any offence which is indictable by force of the laws of this State.

Let the Court of Oyer and Terminer be advised accordingly.[1]

Penal Code of New York, § 32. An accessory to a felony may be indicted, tried, and convicted, either in the county where he became an accessory, or in the county where the principal felony was committed.

Mass. R. L. ch. 215, § 43. [An accessory before the fact] may be indicted, tried, and punished in the same county in which the principal felon might be indicted and tried, although the counselling, hiring, or procuring the commission of such felony was committed within or without this commonwealth, or on the high seas.[2]

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[1] *Acc.* State *v.* Chapin, 17 Ark. 561; State *v.* Moore, 26 N. H. 448. But see State *v.* Grady, 34 Conn. 118; State *v.* Ayres, 8 Baxter, 96. — ED.

[2] See Com. *v.* Pettes, 114 Mass. 307. — ED.

LINDSEY *v.* STATE.

SUPREME COURT OF OHIO. 1882.

[*Reported* 38 *Ohio State*, 507.]

THE plaintiff in error, and one John T. Morris, were jointly indicted in Jefferson County. The charge is that they did unlawfully and feloniously utter and publish in said county, as true and genuine, a certain false, forged, and counterfeit deed of real estate, purporting to be executed and acknowledged by Maurice F. Thornton and wife, before Herman E. Shuster, a notary public of the State of Missouri, and to convey certain lands in that State to James Turnbull, of Jefferson County, Ohio.

The plaintiff in error had a separate trial, and was convicted and sentenced.

The evidence tended to show that the deed was a forgery, executed in St. Louis by the notary public by the procurement of Lindsey, who then and thereafter, until forcibly brought to Ohio, was never in this State; that this deed was delivered by Lindsey or his agent to his co-defendant Morris (who is awaiting his trial), and by him was sent by mail to T. & D. Hall, real estate agents in Steubenville, through whom it was uttered and published by a sale of the land to Turnbull. T. & D. Hall were the innocent agents in the transaction, and received and accounted for the purchase-money, less commissions.[1]

JOHNSON, J. Two questions are presented on the foregoing statement: —

First. Had the court jurisdiction over the plaintiff in error? and,

Second. Were the conveyances of other lands admissible for the purpose of showing guilty knowledge?[2]

First. As to the jurisdiction of the court: Is the crime charged an extra-territorial crime? Was it committed by the accused in Missouri, or in Ohio?

If he were indicted for the forgery of this deed, he could not be punished in Ohio, as it is conceded that all his acts that constitute that crime were committed in Missouri. When he procured the notary in St. Louis to forge the signatures, and the acknowledgment of the grantors, with the criminal intent, the crime of forgery was consummated in the State of Missouri. But this is not the charge in the case at bar. It is for knowingly uttering and publishing as true and genuine a false and forged deed. It is wholly immaterial where the forgery was committed.

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[1] Part of the evidence and the arguments of counsel are omitted.

[2] That portion of the opinion which relates to the second question is omitted.

The question therefore is, was this deed uttered and published in Jefferson County, Ohio, and was Lindsey guilty of this crime?

That this forged deed was uttered and published in Ohio by T. & D. Hall, who supposed it was genuine, is clear from the evidence.

Now, it is assumed that the jury had evidence to warrant them in finding that T. & D. Hall did so utter and publish this deed by the procurement of Lindsey.

The crime was therefore completed or consummated in Ohio, through the instrumentality of an innocent agent. It is wholly immaterial whether his co-defendant Morris was his confederate or his dupe, as in either case the acts of Morris by correspondence mailed in St. Louis to T. & D. Hall were simply the means used to consummate a crime in Ohio. The crime had its inception in Missouri, but it was committed in Ohio by innocent agents. If a letter containing a forged instrument is mailed at one place to be sent to another, the venue must be laid where the letter is received. 3 Greenl. § 112.

The crime of uttering and publishing is not complete until the paper comes to the hands of some one other than the accused, and if it be sent by mail for the purpose of being there used, the crime is not consummated until it is received by the person to whom it is to be delivered. It is a fundamental principle that a person is responsible criminally for acts committed by his procurement as well as for those done in person. The inherent power of the state to punish the uttering and publication of forged instruments within its territorial limits, without regard to the place where the forgery was committed, or purpose was formed, is essential to the protection of her people. It is now a generally accepted principle that one who in one county or state employs an innocent agent in another to commit a crime, is liable in the latter county or state. Robbins *v.* The State, 8 Ohio St. 131; Norris *v.* The State, 25 Ohio St. 217; 1 Whart. Crim. Law (7th ed.), §§ 210, 278; see also Commonwealth *v.* Macloon, 101 Mass. 1; Commonwealth *v* Smith, 11 Allen (Mass.), 243; Commonwealth *v.* Blanding, 3 Pick. 304; Rex *v.* Johnson, 7 East, 65; Wh. Con. of L. §§ 877–921; People *v.* Adams, 3 Denio, 190, affirmed 1 N. Y. 173; United States *v.* Davis, 2 Sumn. 482: State *v.* Wyckoff, 2 Vroom (N. J.) 68; Commonwealth *v.* Gillespie, 7 Serg. & R. 469; Stillman *v.* White Rock Co., 3 Woodb. & M. 538; Rex *v.* Garrett, 6 Cox C. C. 260; Rex *v.* Jones, 4 Cox C. C. 198; State *v.* Grady, 34 Com. 118.[1]

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[1] *Acc.* Reg. *v.* Taylor, 4 F. & F. 511; People *v.* Adams, 3 Den. 190; 1 N. Y. 173. See Reg. *v.* Finkelstein, 16 Cox C. C. 107. — ED.

STATE *v.* CARTER.

SUPREME COURT OF NEW JERSEY 1859.

[*Reported* 3 *Dutcher*, 499.]

VREDENBURGH, J. The indictment charges that the defendant, on the 29th of December, 1858, in the city of New York, gave one Brushingham several mortal bruises, of which, until the 31st of December, 1858, as well in New York as in Hudson County, in this state, he languished, and of which, in said Hudson County, he then died. To this indictment the defendant pleaded that the court had not jurisdiction of the cause. The defendant, we must assume, was a citizen of the State of New York. Nothing was *done* by the defendant in this state. When the blow was given, *both* parties were out of its jurisdiction, and within the jurisdiction of the State of New York. The only fact connected with the offence alleged to have taken place within our jurisdiction is, that *after* the injury, the deceased came into, and died in this state. This is not the case where a man stands on the New York side of the line, and shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile, passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state, as where he stands in it.

Here no act is done in this state by the defendant. He sent no missile, or letter, or message, that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable as such wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place, murder, in its various degrees, in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel.

This is not like the case of stolen goods, carried from one state to another, or of leaving the state for any purpose whatever, like that for fighting a duel, or of sending a letter or messenger, or message, for any purpose, into another state; for in all these cases the cognizance is taken for an *act done* within the jurisdiction.

If the acts charged in this indictment be criminal in New Jersey, it must be either by force of some statute or upon general principles. There is no statute, unless it be the act to be found in Nix. Dig. 184, s. 3. But this evidently relates to murder only, and not to manslaughter.

But I cannot make myself believe that the legislature, in that act, intended to embrace cases where the injury was inflicted within a foreign jurisdiction without any act done by the defendant within our own. Such an enactment, upon general principles, would necessarily be void; it would give the courts of this state jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons in all cases where personal injuries are followed by death.

An act, to be criminal, must be alleged to be an offence against the sovereignty of the government. This is of the very essence of crime punishable by human law. How can an act done in one jurisdiction be an offence against the sovereignty of another? All the cases turn upon the question where the act was done. The person who does it may, when he does it, be within or without the jurisdiction, as by shooting or sending a letter across the border; but the act is not the less done within the jurisdiction because the person who does it stands without. This case is not at all like those where the defendant is tried in England for a crime committed in one of the dependencies of the British empire. There the act is done, and the crime is in fact committed against the sovereignty of the British crown, and only the place of trial is changed.

If our government takes jurisdiction of this case, it must be not by virtue of any statute, but because it assumes general power to punish acts *mala in se* wherever perpetrated in the world. The fact of the party injured can give no additional jurisdiction.

Such crimes may be committed on the high seas, in lands where there are, or where there are not regular governments established. When done upon the high seas, they may be either upon our vessels or upon vessels belonging to other governments. When done upon our vessels, in whatever solitary corner of the ocean, from the necessity of the case, and by universal acceptance, the vessel and all it contains is still within our jurisdiction, and when the vessel comes to port the criminal is still tried for *an act done* within our jurisdiction. But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government.

When an act *malum in se* is done in solitudes, upon land where there has not yet been formerly extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. Further than this it could not have been intended that our statute should apply. But here the act was done in the State of New York, a regularly organized and acknowledged supreme government. The act was a crime against their sovereignty. That was supreme within its territorial limits and in its very nature, and in fact is exclusive. There cannot be two sovereignties supreme over the same place at the same time over the same subject-matter. The existence of theirs is exclusive of ours. We may exercise acts of sovereignty over the wastes of ocean or of land, but we must necessarily stop at the boundary of another. The allegation of an act done in another sovereignty, to be a violation of our own, is simply alleging an impossibility, and all laws to punish such acts are necessarily void.

It is said that if we do not take jurisdiction, the defendant will go unpunished, inasmuch as, the party injured not dying in New York, he could not be guilty of murder there. But New York may provide by law for such cases, and if she does not, it is their fault, and not ours. The act done is against their sovereignty, and if she does not choose to avenge it, it is not for us to step in and do it for them.

I think that the Oyer and Terminer should be advised that no crime against this state is charged in the indictment.[1]

COMMONWEALTH *v.* MACLOON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[*Reported* 101 *Massachusetts*, 1.]

GRAY, J.[2] The defendants, the one a citizen of Maine, and the other a British subject, have been convicted in the Superior Court in Suffolk of manslaughter of a man who died within the county in consequence of injuries inflicted by them upon him in a British merchant ship on the high seas.

The principal question in the case is that of jurisdiction, which touches the sovereign power of the Commonwealth to bring to justice the murderers of those who die within its borders. This question has been ably and thoroughly argued, and has received the consideration which its importance demands.

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[1] *Acc.* State *v.* Kelly, 76 Me. 331. — ED.

[2] Part of the opinion only is given.

The statute on which the defendants were indicted, after prescribing the punishment for murder and manslaughter, provides that "if a mortal wound is given, or other violence or injury inflicted, or poison is administered, on the high seas, or on land, either within or without the limits of this state, by means whereof death ensues in any county thereof, such offence may be prosecuted and punished in the county where the death happens." Gen. Sts. c. 171, § 19.

This statute is founded upon the general power of the legislature, except so far as restrained by the constitutions of the Commonwealth and of the United States, to declare any wilful or negligent act which causes an injury to person or property within its territory to be a crime, and to provide for the punishment of the offender upon being apprehended within its jurisdiction.

Whenever any act, which, if committed wholly within one jurisdiction would be criminal, is committed partly in and partly out of that jurisdiction, the question is whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction.

A good illustration of this is afforded by the cases of bringing stolen goods from one jurisdiction to another. It has been held from the earliest times that if a thief steals goods in one county, and brings them into another, he may be indicted in either county, because his unlawful carrying in the second is deemed a continuance of the unlawful taking, and so all the essential elements of larceny exist in the second; but if he takes the goods by force, although this is robbery in the county in which he first takes them, it is but larceny in any county into which he afterwards carries them, because no violence to the person has been used in the latter. 1 Hale P. C. 507, 508, 536; 2 Hale P. C. 163; 4 Bl. Com. 305. If he steals goods on the high seas or in a foreign country, and brings them into this state, it is not a common law larceny, because there has been no taking against the law which is invoked to punish him. Butler's Case, 13 Co. 53; s. c. 3 Inst. 113; Commonwealth *v.* Uprichard, 3 Gray, 434. Yet if the legislature see fit to provide that the bringing into the state of goods taken without right from the owner in a foreign country, shall be punished here as larceny, it is within their constitutional authority to do so. People *v.* Burke, 11 Wend. 129; State *v.* Seay, 3 Stew. 123; Hemmaker *v.* State, 12 Missouri, 453. By a series of decisions, beginning while the states of this Union were colonies of Great Britain, it has been held that a bringing into Massachusetts of goods stolen in another colony or state subject to the same national sovereignty might be indicted here as a larceny at common law. Commonwealth *v.* Andrews, 2 Mass. 14, and cases cited; Commonwealth *v.* Holder, 9 Gray, 7. And in other states, in which the common law has been held not to reach such a case, a statute declaring such bringing to be larceny in the state into which the goods are brought has been acknowledged to be valid and binding upon the courts. Simmons *v.* Commonwealth, 5 Binn. 619; Simpson *v* State. 4 Humph. 461: Beal *v.* State, 15 Ind. 378.

The general principle, that a man who does a criminal act in one county or state may be held liable for its continuous operation in another, has been affirmed in various other cases. Thus a man who erects a nuisance in a river or stream in one county or state is liable, criminally as well as civilly, in any county or state in which it injures the land of another. Bulwer's Case, 7 Co. 2 b, 3 b; 2 Hawk. c. 25, § 37; Com. Dig. Action, N. 3, 11; Abbott, C. J., in The King *v.* Burdett, 4 B. & Ald. 175, 176; Thompson *v.* Crocker, 9 Pick. 59; Stillman *v.* White Rock Manufacturing Co. 3 Woodb. & Min. 538. And one who publishes a libel in another state, in a newspaper which circulates in this commonwealth also, is liable to indictment here. Commonwealth *v.* Blanding, 3 Pick. 304. There is no more reason against holding the wrong-doer criminally liable in the county and state where his victim dies from the continuous operation of his mortal blow, than in those to which the flowing water carries the injurious effect of his nuisance to property, or the circulation of his libel extends the injury to reputation.

Criminal homicide consists in the unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or implied by law, it is murder; if without malice, it is manslaughter. No personal injury, however grave, which does not destroy life, will constitute either of these crimes. The injury must continue to affect the body of the victim until his death. If it ceases to operate, and death ensues from another cause, no murder or manslaughter has been committed. But if the bullet remains in the body so as to press upon or disturb the vital organs and ultimately produce death, or the wound or the poison causes a gradual decline of health, ending in death, the injury and death are as much the continuous operation and effect of the unlawful act as if the shot, the stab, or the poison proves instantly fatal. The unlawful intent with which the wound is made or the poison administered attends and qualifies the act until its final result. No repentance or change of purpose, after inflicting the injury or setting in motion the force by means of which it is inflicted, will excuse the criminal. If his unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction. 1 Hale P. C. 475; People *v.* Adams, 3 Denio, 207; s. c. 1 Comst. 176, 179. If he knowingly lets loose a dangerous beast, which runs any distance and then kills a man; or incites a madman or a child not of years of discretion to commit murder in his absence, whereby any one is killed; or, with intent to murder, leaves poison with another person to be administered to a third, and the poison is administered by the same or another innocent agent, and causes the death of the person intended, or any other; he is responsible as principal, to the same extent as if personally present at the actual killing. 1 Hale P. C. 430, 431, 615, 617; Regina *v.* Michael, 9 C. & P. 356; s. c. 2 Moody, 120; People *v.* Adams, *supra.* And if he wilfully inflicts a wound which results fatally, he is not excused by the fact that the negligence of the wounded man or the unskilful treatment of surgeons hastens or contributes to the death. 1 Hale P. C. 428; Commonwealth *v.* Hackett, 2 Allen, 136. The person who unlawfully sets the means of death in motion, whether through an irresponsible instrument or agent, or in the body of the victim, is the guilty cause of the death at the time and place at which his unlawful act produces its fatal result; and, according to the great weight of authority, may be then and there tried and punished, under an express statute, if not by the common law.

The crime not being murder or manslaughter before the death, an indictment alleging the stroke at one day and place, and the death at another day and place, is good if it alleges the murder or manslaughter to have been at the time and place of the death, but bad if it alleges that the defendant killed and murdered the deceased at the day and place at which the stroke was given, "for," in the words of Lord Coke, "though to some purpose the death hath relation to the blow, yet this relation, being a fiction in law, maketh not the felony to be then committed." 2 Inst. 318; 1 Hale P. C. 427; 2 Hale P. C. 188. So the year and day "after the deed, — *apres le fait,*" within which by the Statute of Gloucester an appeal of murder must be brought, was held to run not from the blow, but from the death, "for before that time no felony was committed." 2 Inst. 320; 1 Hale P. C. 427. And manslaughter arising out of a blow struck in one county, followed by death in another, was held by Mr. Justice Littledale to be a felony "begun in one county and completed in another," within the meaning of a modern English statute authorizing such a felony to be indicted in either county. Rex *v.* Jones, 1 Russell on Crimes (3d Eng. ed.), 549, 550.

Whenever at common law murder escaped punishment at the place of the death, it was not from a want of authority in the government, but from a defect in the laws regulating the mode of prosecution and trial.

In the beginning of the reign of Edward III., according to Chief Justice Scrope, if a man died in one county of a wound received in another, the murderer might be indicted and arraigned in the county where the death happened, "and yet the cause of his death began in the other county." Fitz. Ab. Corone, 373. At a later period, it was held that where a man was feloniously stricken or poisoned in one county, and died in another county, no indictment could be found in either county, because both the stroke and the death were necessary to constitute the crime, and the jurors of one county could not inquire of that which was done in another, "unless," as Lord Hale says, "specially enabled by act of parliament;" and for this reason the custom at one time prevailed of taking the dead body into the county where the mortal stroke was given, and having an indictment found and tried there; and, in carrying out the same principle, it was held that an appeal of murder, which required no indictment, but was sued out by the nearest relation, and prosecuted by the king only in case of the withdrawal of the appellant, might be brought in the county of the death, although the mortal stroke was given in another county, provided there were legal means of summoning a jury for the trial out of both counties, but not otherwise. 6 Hen. VII. 10, pl. 7; 3 Inst. 48, 49; 2 Hale P. C. 163; 1 Stark. Crim. Pl. 3, and notes.

The St. of 2 & 3 Edw. VI. c. 24, begins with declaring, "Forasmuch as the most necessary office and duty of law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and wilfully murder, slay, or destroy men," and, after reciting the defects in the previous laws, enacts, "for redress and punishment of which offences and safeguard of man's life," that "where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace or other justices or commissioners which shall have authority to inquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden; any law or usage to the contrary notwithstanding." That statute, passed within a century before the settlement of Massachusetts, and manifestly suitable to our condition, would seem to have been part of our common law. Commonwealth *v.* Knowlton, 2 Mass. 534; Report of the Judges, 3 Binn. 595, 620; State *v.* Moore, 26 N. H. 448.

In the most ancient times of which we have any considerable records, the English courts of common law took jurisdiction of crimes committed at sea, both by English subjects and by foreigners. Beufo *v.* Holtham, 25 Edw. I., in Selden's Notes to Fortescue, c. 32; Case of the Norman Master and English Seamen, 40 Assis. 25; s. c. Fitz. Ab. Corone, 216; 13 Co. 53, 54; 2 Hale P. C. 12, 13, and notes, and cases cited. But after the admiralty jurisdiction had been settled by the Sts. of 13 and 15 Ric. II., if a mortal stroke was given on the high sea, and the person stricken came to land in England and died there, then, according to the rule established before the St. of Edw. VI. in the case of two counties, the courts of common law could not try the murderer, because no jury could inquire of the stroke at sea, and the admiral could not try him, for want of authority to inquire of the death on land. 3 Inst. 48.

Both Lord Coke and Lord Hale, however, were of opinion that such a murderer could not wholly escape punishment, although they differed as to the mode of bringing him to justice Co. Lit. 74 b; 3 Inst. 48; 2 Hale P. C. 12–20.

Neither Lord Coke nor Lord Hale suggests any doubt of the rightful power of the legislature to pass a statute to punish whoever should cause death within the realm by an injury on the high seas. And in 1729 the parliament of Great Britain passed a statute, declared to be "for preventing any failure of justice and taking away all doubts touching the trial of murders in the cases hereinafter mentioned," by which it was enacted that, where any person should be feloniously stricken or poisoned upon the sea or at any place out of England, and should die of the same stroke or poisoning in England; or where any person should be feloniously stricken or poisoned at any place in England, and should die of the same stroke or poisoning upon the sea or at any place out of England; in either of said cases the offenders, both principals and accessories, might be indicted, tried, convicted and sentenced in the county in England in which such death-stroke or poisoning should happen respectively, with the same effect as if the felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, had happened in the same county. St. 2 Geo. II. c. 21. That statute did not extend to the colonies, and was repealed by St. 9 Geo. IV. c. 31, § 1; and no suggestion appears to have been made, while it was in force, of its being limited in its application to British subjects. 4 Bl. Com. 303; 1 East P. C. 366. The only published exposition of it is in an opinion given by Sir James Marriott as advocate-general, who, looking upon the subject in the view of the law of nations, wrote: "With respect to murders, when persons die in a foreign country of a wound received within this realm, or die in this realm of a wound received in a foreign country, in either alternative the party giving the wound, and his accessory or accessories, by St. 2 Geo. II. c 21, must be tried in England, the statute considering the cause and effect as one continuity of action without interval, in order to found a domestic jurisdiction and to reach the crime." Forsyth's Opinions on Constitutional Law, 218. In The King *v.* Farrel, 1 W. Bl. 459, Lord Mansfield treated the question whether a murder by a mortal stroke on the high seas, from which death ensued in Ireland, was triable in Ireland, as depending upon the question whether there was any Irish statute upon the subject. In fact, the Irish St. of 10 Car. I. contained provisions similar to the English Sts. of Edw. VI. and Geo. II. 1 Gabbett's Crim. Law, 501. Thus stood the law of the mother country at the time of the American Revolution.

The courts of the United States have held that a mortal stroke on the high seas, from which death ensues on land, either in a foreign country or within the United States, cannot be indicted under an act of Congress providing for the punishment of murder or manslaughter on the high seas. The reason was thus stated by Mr. Justice Washington, in the leading case: "The death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there." "The present is a case omitted in the law; and the indictment cannot be sustained." "It would be inconsistent with common law notions to call it murder; but Congress, exercising the constitutional power to define felonies on the high seas, may certainly provide that a mortal stroke on the high sea, wherever the death may happen, shall be adjudged to be a felony." United States v. M'Gill, 4 Dall. 427; s. c. 1 Wash. C. C. 463. United States v. Armstrong, 2 Curtis C. C. 446. Congress has accordingly passed statutes providing for the punishment, at first of murder only, and afterwards of manslaughter, by a blow, wound or poison on the high seas, or in any river or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, followed by death on land. U. S. Sts. 1825, c. 65, § 4; 1857, c. 116, § 1.

The legislature of the Commonwealth, from an earlier period, has asserted the right of punishing such crimes in the county where they take final effect by destroying life. At February term, 1795, of this court in Suffolk, a conviction of manslaughter at common law was had upon an indictment charging that Joseph Hood on the high seas mortally injured John Antony, by assaulting and beating him with a rope and a stave and his hands and feet, and exposing him without sufficient covering to the cold, winds, and storms, and depriving him of necessary food, of all which injuries he languished on the high seas and at Boston in said county, and died at Boston. At August term, 1795, judgment was arrested, upon the ground that the indictment charged that the cause of death arose on the high seas and not within the jurisdiction of this court. Hood's Case, Rec. 1795, fol. 216, and papers on file. It was to cure the defect thus declared to exist in our law, that the legislature at its next session, on the 15th of February, 1796, passed the St. of 1795, c. 45, § 2, by which it was enacted that "where any person hereafter shall be feloniously stricken, poisoned, or injured, on the high seas, and without the limits of this Commonwealth, and die of the same stroke, poisoning or injury in any county thereof, that then an indictment thereof, found by the grand jurors of the county where the death shall happen, before the justices of the Supreme Judicial Court there held, shall be as good and effectual in law as if the stroke had been given or the poisoning or injury done in the same county where the party shall die." By later statutes, all indictments are returned into the lower court. Webster v. Commonwealth, 5 Cush. 386; Gen. Sts. c. 171, §§ 1 & seq., 21 & seq. But the substance of this provision, omitting the word "feloniously" (which might be somewhat difficult of application to an act not done under laws of which our courts have judicial knowledge) and extended to cases in which the mortal wound or injury is given on land without the limits of the Commonwealth, has been embodied in the Rev. Sts. c. 133, § 9, and thence, with merely verbal changes, in the Gen. Sts. c. 171, § 19, on which this indictment is founded. Neither of these statutes appears to have been made the subject of judicial exposition. But a law which has been kept on the statute book for such a length of time by repeated enactments is not to be lightly declared invalid for exceeding the legislative power. And it comes within the principle by which the preceding section, relating to death resulting in one county from an unlawful act in another, was held valid in Commonwealth *v.* Parker, 2 Pick. 550, before cited.

A similar enactment, adding, after "high seas," "or on any other navigable waters," has been sustained upon full argument and consideration by the Supreme Court of Michigan. Tyler *v.* People, 8 Mich. 320.

The most plausible form of the argument against the jurisdiction is, that the coming into the state is the act not of the wrong-doer, but of the injured person, and therefore should not subject the former to the jurisdiction, merely because the latter happens to die there. But it is the nature and the right of every man to move about at his pleasure, except so far as restrained by law; and whoever gives him a mortal blow assumes the risk of this, and in the view of the law, as in that of morals, takes his life wherever he happens to die of that wound; and may be there punished if the laws of the country have been so framed as to cover such a case.

In State *v.* Carter, 3 Dutcher, 499, the supreme court of New Jersey held that a man could not be indicted in that state for manslaughter by mortal bruises given in New York, of which the person injured died in New Jersey. But the only statute of that state upon the subject, as was observed by Mr. Justice Vredenburgh in delivering the judgment of the court, evidently relates to murder only, and not to manslaughter. His remarks upon the power of the legislature of New Jersey to provide for the punishment of such a case are therefore purely *obiter dicta;* and they are unsupported by any reference to authorities, and present no considerations which require further discussion.

Grosvenor *v.* St. Augustine, 12 East, 244, was not a criminal case, but in the nature of an action against the hundred on the St. of 19 Geo. II. c. 34, § 6, which provided that if any officer of the revenue should be beaten, wounded, maimed or killed by a smuggler, the inhabitants of the lath in such counties as were divided into laths, and in other counties the inhabitants of the hundred, "where such fact shall be committed," should pay all damages suffered by such beating, wounding or maiming, and one hundred pounds to the executor or administrator of each person so killed. It was indeed held that this penalty might be recovered by the executor of a revenue officer who received a mortal wound in a boat between high and low water mark, of which he afterwards died on the high sea, by a shot fired from the shore within the lath. But that was upon the construction of the particular statute, as appears from Lord Ellenborough's judgment. "The shot which produced the death, having been fired from the shore within the lath, brings the case within the fair meaning of the act, the object of which was to make the inhabitants of that place where the act was done which caused the death answerable for it, in order to interest them in repressing the offences against which the act was levelled." All the authorities agree that the mere fact of the shot being fired from the shore would not give the courts of common law jurisdiction of an indictment for homicide. Rex *v.* Coombes, 2 Leach (4th ed.), 388; 2 Chalmers Opinions, 217; United States *v.* Davis, 2 Sumner, 485.

The learned counsel for the defendants much relied on the case of Regina *v.* Lewis, Dearsly & Bell, 182; S. C. 7 Cox Crim. Cas. 277. That was an indictment on the St. of 9 Geo. IV. c. 31, § 8, which was held not to cover the case of a foreigner dying in England from injuries inflicted by another foreigner in a foreign vessel upon the high seas. But, although at the argument two of the judges, Mr. Justice Coleridge and Mr. Baron Martin, expressed doubts whether parliament could legislate for the punishment of such a crime, none of the judges except Mr. Justice Crompton denied the power; Lord Chief Justice Cockburn suggested that the section under which the indictment was found, taken in connection with the next preceding section, relating to murder or manslaughter in a foreign country, which was in terms limited to British subjects, must be equally limited; and after advisement the opinion of the court was put upon that ground only. The case of Nga Hoong *v.* The Queen, 7 Cox Crim. Cas. 489, was decided upon like considerations. Both of those cases, therefore, merely held that the whole tenor of the statute in question showed that it was not intended to cover cases of foreigners sailing on the high seas under a foreign flag, applying the same rule of construction as the Supreme Court of the United States in United States *v.* Palmer, 3 Wheat. 631-634, and United States *v.* Pirates, 5 Wheat. 195-197. Whether an explicit statute of the state where a murdered man dies will warrant the indictment and trial of his murderer if found within the jurisdiction is quite a different question.

Neither of the statutes of the Commonwealth upon this subject has ever contained any words limiting the description of the persons by whom the offence might be committed: and the existing statute clearly manifests the intention of the legislature to punish all who without legal justification cause the death of any person within the Commonwealth, wherever the first wrongful act is done, or of whatever country the wrong-doer is a citizen. The power of the Commonwealth to punish the causing of death within its jurisdiction is wholly independent of the power of the United States, or of the nation to which the vessel belongs, to punish the inflicting of the injury on the high seas. And upon full consideration the court is unanimously of opinion that there is nothing in the Constitution or laws of the United States, the law of nations, or the Constitution of the Commonwealth, to restrain the legislature from enacting such a statute.

Exceptions overruled.

PEOPLE *v.* BOTKIN.

SUPREME COURT OF CALIFORNIA. 1901.

[*Reported* 132 *Cal.* 231.]

GAROUTTE, J. Defendant has been convicted of the crime of murder, and prosecutes this appeal. The charge of the court given to the jury upon the law contained declarations which were held to be unsound in People *v.* Verneseneckockockhoff, 129 Cal. 497. In view of the decision in that case, the attorney-general concedes that the judgment should be reversed and the cause remanded to the trial court for further proceedings. But defendant claims that she is not triable at all by the courts of this state, and this contention should now be passed upon. For if maintainable a second trial becomes a useless expenditure of money, time, and labor, and necessarily should not be had.

For the purposes of testing the claim of lack of jurisdiction in the courts of California to try defendant, the facts of this case may be deemed as follows: Defendant, in the city and county of San Francisco, state of California, sent by the United States mail to Elizabeth Dunning, of Dover, Delaware, a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts may the defendant be charged and tried for the crime of murder in the courts of the state of California? We do not find it necessary to declare what the true rule may be at common law upon this state of facts, for, in our opinion, the statute of this state is broad enough to cover a case of the kind here disclosed. There can be no question but that the legislature of this state had the power to declare that the acts here pictured constitute the crime of murder in this state, and we now hold that the legislative body has made that declaration.

Section 27 of the Penal Code reads as follows: —

"The following persons are liable to punishment under the laws of this state: —

"1. All persons who commit, in whole or in part, any crime within this state;

"2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state;

"3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein."

Subdivision 1 covers the facts of this case. The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder, and defendant could have been prosecuted in this state for that crime, if, for any reason, the candy had failed to fulfill its deadly mission. That being so, — those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed, — nothing is plainer than that the crime of murder was in part committed within this state. The murder being committed *in part* in this state, the section of the law quoted declares that persons committing murder under those circumstances "are liable to punishment under the laws of this state." The language quoted can have but one meaning, and that is: a person committing a murder in part in this state is punishable under the laws of this state, the same as though the murder was wholly committed in this state.

Counsel for defendant insist that this section contemplates only offences committed by persons who, at the time, are without the state. This construction is not sound. For as to subdivision 1, it is not at all plain that a person without the state could commit, in whole, a crime within the state. Again, if the crime in whole is committed within the state by a person without the state, such a person could not be punished under the laws of this state, for the state has not possession of his body, and there appears to be no law by which it may secure that possession. Indeed, all of the subdivisions of the section necessarily contemplate a case where the person is, or comes, within the state. If the framers of the section had intended by subdivision 1 to cover the case of persons only who were without the state when the acts were committed which constitute the crime, they would have inserted in the section the contingency found in the remaining subdivisions, which subdivisions contemplate a return to the state of the person committing the crime. It is plain that the section by its various provisions was intended to embrace *all persons* punishable under the laws of the state of California. The defendant, having committed a murder in part in the state of California, is punishable under the laws of the state, exactly in the same way, in the same courts, and under the same procedure, as if the crime was committed entirely within the state.

For the foregoing reasons the judgment and orders are reversed and the cause remanded.

CHAPTER III.

THE OFFENCE: MODIFYING CIRCUMSTANCES.

SECTION I.

Participation of a Public Officer.

REX *v.* MARTIN.

CROWN CASE RESERVED. 1811.

[*Reported Russell & Ryan*, 196.]

THE defendant was tried before MR. BARON WOOD, at the Lent assizes, for Northamptonshire, in the year 1811, upon an indictment for a misdemeanor in unlawfully aiding and assisting Antoine Mallet, a prisoner at war detained within certain limits at Northampton, to escape and go at large out of the said limits, and conducting him and bringing him to Preston Turnpike Gate, at Northampton, with intent to enable and assist him to escape and go at large out of this kingdom to parts beyond the seas.

The case appeared to be this.

The defendant lived at Wantage, in Berkshire; she came to Newport Pagnell, and there hired a post-chaise to take her to Northampton, and back. The post-boy drove her to Northampton, where she got out, and the post-boy went to his usual inn, with orders to return to the place where he set her down, after he had baited and rested his horses. The post-boy in about an hour returned, took the defendant up again in Northampton, and proceeded towards Newport, and when they had just got without the town (and within the limits allowed to the prisoners of war, being one mile from the extremity of the town), she called to the post-boy to stop and take up a friend of hers that was walking along the road. The post-boy stopped, and Mallet got in, and they proceeded together to Preston Turnpike Gate (which is without the aforesaid limits), in the road to Newport, when they were both stopped and apprehended by the commissary, or agent for French prisoners and his assistant who had watched them.

It appeared in evidence that there was no real escape on the part of Mallet, but that he was employed by the agent for French prisoners, under the direction of the Transport Board to detect the defendant, who was supposed to have been instrumental in the escape of many French prisoners from Northampton, and that all the acts done by Mallet, the contract for the money to be paid to the defendant, and the place to which they were to go, before they would be stopped, were previously concerted between the agent for the prisoners and Mallet, and Mallet had no intention to go away or escape.

It was objected to by the counsel for the defendant that the commissary, having given license to Mallet to go to the place he did go to, had enlarged the limits of his parole to that place, and therefore Mallet could not be said to have escaped, nor could the defendant be said to have assisted him in escaping out of the limits of his parole.

The learned judge proceeded in the trial, and the defendant was convicted, but he respited the judgment and reserved the point for the consideration of the judges.

In Trinity term, 15th June, 1811, all the judges met (except LAWRENCE, J.,) when they held the conviction wrong, inasmuch as the prisoner never escaped or intended to escape.

GRIMM *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported* 156 *U. S.* 604.]

INDICTMENT under Rev. St. § 3893 for mailing obscene pictures.[1]

BREWER, J. . . . A final matter complained of grows out of these facts: It appears that the letters to defendant — the one signed "Herman Huntress," described in the second count, and one signed "William W. Waters," described in the fourth count — were written by Robert W. McAfee; that there were no such persons as Huntress and Waters; that McAfee was and had been for years a post-office inspector in the employ of the United States, and at the same time an agent of the Western Society for the Suppression of Vice; that for some reasons not disclosed by the evidence McAfee suspected that defendant was engaged in the business of dealing in obscene pictures, and took this method of securing evidence thereof; that after receiving the letters written by defendant, he, in the name of Huntress and Waters, wrote for a supply of the pictures, and received from defendant packages of pictures which were conceded to be obscene. Upon these facts it is insisted that the conviction cannot be sustained because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers; that they were directed and mailed to fictitious persons; that no intent can be imputed to defendant to convey information to other than the persons named in the letters sent by him, and that as they were fictitious persons there could in law be no intent to give information to any one. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of United States *v.* Whittier, 5 Dillon, 35; United States *v.* Matthews, 35 Fed. Rep. 890; United States *v.* Adams, 59 Fed. Rep. 674; Saunders *v.* People, 38 Michigan,

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[1] The statement of facts and part of the opinion, dealing with the sufficiency of the indictment, are omitted. — ED.

218, in support of the contention that no conviction can be sustained under the facts in this case.

It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official — a detective, he may be called — do not of themselves constitute a defence to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defence that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. Among others reference may be made to the cases of Bates *v.* United States, 10 Fed. Rep. 92, and the authorities collected in a note of Mr. Wharton, on page 97; United States *v.* Moore, 19 Fed. Rep. 30, United States *v.* Wight, 38 Fed. Rep. 106, in which the opinion was delivered by Mr. Justice Brown, then District Judge, and concurred in by Mr. Justice Jackson, then Circuit Judge; United States *v.* Dorsey, 40 Fed. Rep. 752; Commonwealth *v.* Baker, 155 Mass. 287, in which the court held that one who goes to a house alleged to be kept for illegal gaming, and engages in such gaming himself for the express purpose of appearing as a witness for the government against the proprietor, is not an accomplice, and the case is not subject to the rule that no conviction should be had on the uncorroborated testimony of an accomplice; People *v.* Noelke, 94 N. Y. 137, in which the same doctrine was laid down as to the purchaser of a lottery ticket, who purchased for the purpose of detecting and punishing the vendor; State *v.* Jansen, 22 Kansas, 498, in which the court, citing several authorities, discusses at some length the question as to the extent to which participation by a detective affects the liability of a defendant for a crime committed by the two jointly; State *v.* Stickney, 53 Kansas, 308. But it is unnecessary to multiply authorities. The law was actually violated by the defendant; he placed letters in the post-office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt.

These are all the questions presented by counsel. We see no error in the rulings of the trial court, and the judgment is, therefore,

Affirmed.

PEOPLE *v.* MILLS.

COURT OF APPEALS OF NEW YORK. 1904.

[*Reported* 178 *N.Y.* 274.]

INDICTMENT for theft of public records. The defendant was convicted of an attempt to commit larceny of the records. The defendant, desiring to have a certain indictment removed from the records, offered an assistant district attorney a bribe to remove and give it up. The district attorney being informed of the scheme directed his assistant seemingly to comply with it; the assistant thereupon, for the purpose of apprehending the defendant, removed the indictment and handed it to the defendant, who was thereupon arrested by police officers in waiting. A judgment of conviction was affirmed by the Appellate Division, and an appeal was taken.[1]

VANN, J. The indictments against Dr. Flower were records or documents filed in a public office, under the authority of law. (Code Crim. Pro. § 272, Code Civ. Pro. § 866.) They were the property of the state and a wilful and unlawful removal of them constituted a crime under section 94 of the Penal Code. Any one who unlawfully obtained or appropriated them was guilty of grand larceny in the second degree, according to the provisions of another section of the same statute. (Penal Code, § 531.) Whoever is guilty of violating either section may be convicted of an attempt to commit the offence specified therein, even if it appears on the trial that the crime was fully consummated, unless the court in its discretion discharges the jury and directs the defendant to be tried for the crime itself, which was not done in the case before us. (Code Crim. Pro. §§ 35 and 685). The jury found the defendant guilty of an attempt both to remove and to steal the indictments, and after affirmance by the Appellate Division we are confined in our review to such questions as were raised by exceptions taken during the trial.

In view of the able and exhaustive opinion of the Appellate Division, the only question we feel called upon to consider is that raised by the challenge of the learned counsel for the appellant in the nature of a demurrer to the evidence. He claims that even on the assumption that all the evidence for the prosecution is true, still the facts thus proved do not constitute the crime charged in either count of the indictment. His argument is that the object of the district attorney was not to detect, but to create a crime, and that no crime was committed by the defendant in taking the indictments into his possession, because he took them with the consent of the state as represented by the district attorney.

The flaw in this argument is found in the fact that the records were the property of the state, not of the district attorney, and that the latter could not lawfully give them away or permit them to be taken by the defendant. Purity of intention only could prevent the action of the district attorney from being a crime on his part. This is true also as to the detective, for if either had in fact intended that the defendant should permanently remove the indictments, and steal, appropriate or destroy them, he would have come within the statute. Neither of those officers represented the state in placing the records where the defendant could take them, but each was acting as an individual only. Neither had the right or power, as a public officer, to deliver them to the defendant, and if either had acted with an evil purpose, his act would have been criminal in character. . . .

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[1] This short statement is substituted for the longer statement of facts by the Reporter. Part of the opinion is omitted.— ED.

We shall not review the authorities cited on either side, for that duty has been so thoroughly discharged by the Appellate Division that we can throw no further light upon the subject. We merely state that an important distinction between this case and those relied upon by the appellant is found in the difference between public and private ownership of the property taken by the accused. In most cases some third person is injured by the crime and is directly or indirectly the complainant, but in this case the state was, as it must be in all criminal cases, the prosecutor and it was also the injured party, for its property was the subject of the attempt at larceny. If an individual owner voluntarily delivers his property to one who wishes to steal it there is no trespass, but when the property of the state is delivered by any one, under any circumstances, to any person for the purpose of having him steal it and he takes it into his possession with intent to steal it, there is a trespass and the attempt is a crime. The state did not solicit or persuade or tempt the defendant, any more than it took his money when he handed it over to the detective. Neither did the district attorney, as such, but Mr. Jerome did, acting as an individual, with the best of motives, but without authority of law and, hence, his action did not bind the state. While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offence against public justice was established and he could not insist as a defence that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York and, hence, that the assistant had no right to give him its property for the purpose of enabling him to steal it. The judgment of conviction should be affirmed.[1]

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[1] O'BRIEN and BARTLETT, JJ., delivered dissenting opinions.— ED.

SECTION II.

Acquiescence of the Injured Party.

McDANIEL'S CASE.

Crown Case Reserved. 1755.

[*Reported Foster C. L.* 121.]

At the Old Bailey session in December, 1755, Justice Foster pronounced the judgment of the court in the case between the King and Macdaniel and others, to the effect following: —

The indictment chargeth, that at the general gaol-delivery holden at Maidstone in the county of Kent, on the 13th of August in the twenty-eighth year of the King, Peter Kelly and John Ellis were by due course of law convicted of a felony and robbery committed by them in the King's highway in the parish of Saint Paul Deptford in the county of Kent, upon the person of James Salmon one of the prisoners at the bar, and that the prisoners Stephen Macdaniel, John Berry, James Eagen, and James Salmon, before the said robbery, did in the parish of Saint Andrew Holbourn in this city, feloniously and maliciously comfort, aid, assist, abet, counsel, hire, and command the said Peter Kelly and John Ellis to commit the said felony and robbery.

On this indictment the prisoners have been tried, and the jury have found a special verdict to this effect.

That Kelly and Ellis were by due course of law convicted of the said felony and robbery.

That before the robbery all the prisoners and one Thomas Blee, in order to procure to themselves the rewards given by act of Parliament for apprehending robbers on the highway, did maliciously and feloniously meet at the Bell Inn in Holbourn in this city; and did then and there agree that the said Thomas Blee should procure two persons to commit a robbery on the highway in the parish of Saint Paul Deptford, upon the person of the prisoner Salmon.

That for that purpose they did all maliciously and feloniously contrive and agree that the said Blee should inform the persons so to be procured that he would assist them in stealing linen in the parish of Saint Paul Deptford.

That in pursuance of this agreement, and with the privity of all the prisoners, the said Blee did engage and procure the said Ellis and Kelly to go with him to Deptford in order to steal linen; but did not at any time before the robbery inform them or either of them of the intended robbery.

That in consequence of the said agreement at the Bell, and with the privity of all the prisoners, the said Ellis and Kelly went with the said Blee to Deptford.

That the said Blee, Ellis, and Kelly being there, and the prisoner Salmon being likewise there waiting in the highway in pursuance of the said agreement, the said Blee, Ellis, and Kelly feloniously assaulted him, and took from his person the money and goods mentioned in the indictment.

They farther find that none of the prisoners had any conversation with the said Ellis and Kelly or either of them previous to the robbery; but they find, that before the robbery the prisoners Macdaniel, Eagen, and Berry saw the said Ellis and Kelly, and approved of them as persons proper for the purpose of robbing the said Salmon.

But whether the prisoners are guilty in manner as charged in the indictment, they pray the advice of the court.

This special verdict hath been argued before all the judges of England.[1]

It is expressly found that Salmon was party to the original agreement at the Bell; that he consented to part with his money and goods under color and pretence of a robbery; and that for that purpose, and in pursuance of this consent and agreement, he went to Deptford, and waited there till this colorable robbery was effected.

This being the state of the case with regard to Salmon, the judges are of opinion that in consideration of law no robbery was committed on him. His property was not taken from him against his will.

I come now to the case which I promised at the beginning to consider and to distinguish from the present case. One Norden, having been informed that one of the early stage-coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company in the coach and to him, and presenting a weapon demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with his pistol in his hand; and with the assistance of some others took the highwayman.

The robber was indicted about a year ago in this court for a robbery on Norden, and convicted. And very properly, in my opinion, was he convicted.

But that case differeth widely from the present. In that case Norden set out with a laudable intention to use his endeavors for apprehending the highwayman, in case he should that morning come to rob the coach, which at that time was totally uncertain; and it was equally uncertain whether he would come alone or not. In the case now under consideration there was a most detestable conspiracy between Salmon and the rest of the prisoners, that his property should be taken from him under the pretence and show of a robbery; and time, place, and every other circumstance were known to Salmon beforehand, and agreed to by him.

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[1] Part of the case is omitted.

In Norden's case there was no concert, no sort of connection between him and the highwayman; nothing to remove or lessen the difficulty or danger Norden might be exposed to in the adventure. In the present case there was a combination between Salmon and one at least of the supposed robbers. I mean Blee. And though Salmon might not know the persons of Ellis and Kelly; yet he well knew that they were brought to the place by his friend Blee, and were wholly under his direction.

So widely do these cases differ!

To conclude, all the prisoners have been guilty of a most wicked and detestable conspiracy to render a very salutary law subservient to their vile, corrupt views. But great as their offence is, it doth not amount to felony. And therefore the judgment of the court is that they be all discharged of this indictment.[1]

EGGINGTON'S CASE.

CROWN CASE RESERVED. 1801.

[*Reported* 2 *East, Pleas of the Crown*, 666.]

IT appeared that the prisoners, intending to rob Mr. Boulton's manufactory at Soho, had applied to one Phillips his servant, who was employed there as a watchman, to assist them in the robbery. Phillips assented to the proposal of the prisoners in the first instance; but immediately afterwards gave information to Mr. Boulton, the principal proprietor, and in whom the property of the goods taken (together with other persons his partners) was laid; telling him what was intended, and the manner and time the prisoners were to come; that they were to go into the counting-house, and that he was to open the door into the front yard for them. In return, Mr. Boulton told him to carry on the business; that he (Boulton) would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house everything but 150 guineas and some silver ingots, which he marked to furnish evidence against the prisoners; and lay in wait to take them, when they should have accomplished their purpose. On the 23d of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard, and from thence they and Phillips went through a door which was left open, up a staircase in the centre building leading to the counting-house and rooms where the plated business was carried on; this door the prisoners bolted, and then broke open the counting-house which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above into a room, where the plated business was carried on, and broke the door open and took from thence a quantity of silver, and returned downstairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard; where all (except one who escaped) were taken by the persons placed to watch them. On this case two points were made for the prisoners: First, that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. Secondly, that if the facts proved amounted to a felony, it was but a simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be; and that there was no breaking, the door being left open. After conviction, the case was argued before all the judges in the Exchequer Chamber; and, for the reasons before stated, all the judges agreed that the prisoners were not guilty of the burglary.[1]

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[1] See State *v.* Anone, 2 N. & McC. 27; Alexander *v.* State, 12 Tex. 541. — ED.

But with respect to the larceny the majority thought there was no assent in Boulton; that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent, than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. That there was no distinguishing between the degrees of facility a thief might have given to him. That it could only be considered as an apparent assent. That Boulton never meant that the prisoners should take away his property. And the circumstance of the design originating with the prisoners, and Boulton's taking no step to facilitate or induce the offence until after it had been thought of and resolved on by them, formed with some of the judges a very considerable ingredient in the case; and differed it much from what it might have been if Boulton had employed his servant to suggest it originally to the prisoners. LAWRENCE, J., doubted whether it could be said to be done *invito domino*, where the owner had directed his servant to carry on the business, to open the door, and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. Finally, the prisoners were recommended to mercy on condition of being transported for seven years, the punishment they would have been liable to for the larceny. The decision in the above case is consonant to the rule laid down in the civil law under similar circumstances.[2]

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[1] See State *v.* Hayes, 105 Mo. 76, 16 S. W. 514; State *v.* Douglass, 44 Kan. 618. — ED.

[2] *Vide* Just. Inst. lib. 4, tit. 1, s. 8.

TOPOLEWSKI *v.* STATE.

SUPREME COURT OF WISCONSIN. 1906.

[*Reported* 109 *N. W.* 1037.]

THE accused was charged with having stolen three barrels of meat, the property of the Plankinton Packing Company, of the value of $55.20, and was found guilty.

The evidence was to this effect: The Plankinton Packing Company suspected the accused of having by criminal means possessed himself of some of its property, and of having a purpose to make further efforts to that end. A short time before the 14th day of October, 1905, one Mat Dolan, who was indebted to the accused in the sum of upwards of $100, was discharged from the company's employ. Shortly theretofore the accused pressed Dolan for payment of the aforesaid indebtedness, and the latter being unable to respond, the former conceived the idea of solving the difficulty by obtaining some of the company's meat products through Dolan's aid and by criminal means, Dolan to participate in the benefits of the transaction by having the value of the property credited upon his indebtedness. A plan was accordingly laid by the two to that end, which Dolan disclosed to the company. Such plan was abandoned. Thereafter various methods were discussed of carrying out the idea of the accused, Dolan participating with the knowledge and sanction of the company. Finally a meeting was arranged between Dolan and the accused to consider the subject, the packing company requesting the former to bring it about, and with knowledge of Dolan causing one of its employés to be in hiding where he could overhear whatever might be said, the arrangement being made on the part of the company by Mr. Layer, the person in charge of its wholesale department. At such interview the accused proposed that Dolan should procure some packages of the company's meat to be placed on their loading platform, as was customary in delivering meat to customers, and that he should drive to such platform, ostensibly as a customer, and remove such packages. Dolan agreed to the proposition, and it was decided that the same should be consummated early the next morning, all of which was reported to Mr. Layer. He thereupon caused four barrels of meat to be packed and put in the accustomed condition for delivery to customers, and placed on the platform in readiness for the accused to take them. He set a watch over the property, and notified the person in charge of the platform, who was ignorant of the reason for so placing the barrels, upon his inquiring what they were placed there for, to let them go; that they were for a man who would call for them. About the time appointed for the accused to appear, he drove to the platform and commenced putting the barrels in his wagon. The platform boss supposing, as the fact was, that the accused was the man

Mr. Layer said was to come for the property, assumed the attitude of consenting to the taking. He did not actually help load the barrels on to the wagon, but he was by, consented by his manner, and when the accused was ready to go, helped him arrange his wagon, and inquired what was to be done with the fourth barrel. The accused replied that he wanted it marked and sent up to him with a bill. He told the platform boss that he ordered the stuff the night before through Dolan. He took full possession of the three barrels of meat with intent to deprive the owner permanently thereof, and without compensating it therefor, wholly in ignorance, however, of the fact that Dolan had acted in the matter on behalf of such owner, and that it had knowingly aided in carrying out the plan for obtaining the meat.

MARSHALL, J.[1] . . . It was frankly conceded on the oral argument by the learned attorney general that if the plaintiff in error committed the crime of larceny, Dolan, the decoy of the packing company, was a guilty participant in the matter, unless the element of guilt on his part was absent, because, while in the transaction he acted ostensibly as an accomplice of the accused, his acts were in fact those of the packing company. So in the circumstances characterizing the taking of the barrels of meat from the loading platform the case comes down to this: If a person procures another to arrange with a third person for the latter to consummate, as he supposes, larceny of the goods of such person and such third person in the course of negotiations so sanctioned by such person suggests the plan to be followed, which is agreed upon between the two, each to be an actor in the matter, and subsequently that is sanctioned secretly by such person, the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offence of larceny, and such person carries out a part of such plan necessary to its consummation assigned to such other in the agreement aforesaid, such third person not knowing that such person is advised of the impending offence, and at the finality causes one of its employés to, tacitly at least, consent to the taking of the goods, not knowing of the real nature of the transaction, is such third person guilty of the crime of larceny, or does the conduct of such person take from the transaction the element of trespass or nonconsent essential to such crime?

It will be noted that the plan for depriving the packing company of its property originated with the accused, but that it was wholly impracticable of accomplishment without the property being placed on the loading platform, and the accused not being interfered with when he attempted to take it. When Dolan agreed to procure such placing the packing company in legal effect agreed thereto. Dolan did not expressly consent, nor did the agreement he had with the packing company authorize him to do so, to the misappropriation of the property. Did the agreement in legal effect, with the accused to place the property of the packing company on the loading platform, where it could be appropriated by the accused, if he was so disposed and was not interfered with in so doing, though his movements in that regard were known to the packing company, and his taking of the property, his efforts to that end being facilitated as suggested, constitute consent to such appropriation?

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[1] Part of the opinion is omitted. — ED.

The case is very near the border line, if not across it, between consent and nonconsent to the taking of the property. Reg. *v.* Lawrence, 4 Cox C. C. 438, it was held that if the property was delivered by a servant to the defendant by the master's direction the offence cannot be larceny, regardless of the purpose of the defendant. In this case the property was not only placed on the loading platform, as was usual in delivering such goods to customers, with knowledge that the accused would soon arrive, having a formed design to take it, but the packing company's employé in charge of the platform, Ernst Klotz, was instructed that the property was placed there for a man who would call for it. Klotz, from such statement, had every reason to infer, when the accused arrived and claimed the right to take the property, that he was the one referred to, and that it was proper to make delivery to him, and he acted accordingly. While he did not physically place the property, or assist in doing so, in the wagon, his standing by, witnessing such placing by the accused, and then assisting him in arranging the wagon, as the evidence shows he did, and taking the order, in the usual way, from the accused as to the disposition of the fourth barrel, and his conduct in respect thereto, amounted practically to a delivery of the three barrels to the accused.

In Rex *v.* Egginton, 2 P. & P. 508, we have a very instructive case on the subject under discussion here. A servant informed his master that he had been solicited to aid in robbing the latter's house. By the master's direction the servant opened the house, gave the would-be thieves access thereto, and took them to the place where the intended subject of the larceny had been laid in order that they might take it. All this was done with a view to the apprehension of the guilty parties after the accomplishment of their purpose. The servant, by direction of the master, not only gave access to the house, but afforded the would-be thieves every facility for taking the property, and yet the court held that the crime of larceny was complete, because there was no direction to the servant to deliver the property to the intruders or consent to their taking it. They were left free to commit the larceny, as they had purposed doing, and the way was made easy for them to do so, but they were neither induced to commit the crime, nor was any act essential to the offence done by any one but themselves.

In harmony with the case last discussed in Williams *v.* State of Georgia, 55 Ga. 391, cited by counsel for the plaintiff in error, it was held that the owner of property may make everything ready and easy for a larceny thereof by one purposing to steal the same, and then remain passive, allowing the would-be criminal to perpetrate the offence of larceny as to every essential part of such offence, without sacrificing the element of trespass or nonconsent; but if one ostensibly acting as an accomplice, but really for the owner of the property, for the purpose of entrapping the would-be criminal, does acts amounting to the constituents of the crime of larceny, although the accused concurred in and supposed he prompted the act, he is not guilty of larceny. The circumstances of that case were these: The would-be criminal when he took the property supposed he was committing the offence of larceny, and that his associate was criminally participating therein; but because, as a fact, such person was acting by direction of the owner, and actually placed the property in the hands of the taker, the element of nonconsent essential to larceny did not characterize the transaction. A distinction was drawn between one person inducing another to commit the crime of larceny of the former's goods, or such person aiding in the commission of the offence, so far as the mental attitude of such other is concerned, by doing some act essential to such an offence, and merely setting a trap to catch a would-be criminal by affording him the freest opportunity to commit the offence. The latter does not sacrifice the element of nonconsent. State *v.* Jansen, 22 Kan. 498; Varner *v.* State of Georgia, 72 Ga. 745; State *v.* Duncan, 8 Rob. (La.) 562; Reg. *v.* Williams, 1 Car. & K. 195; Rex *v.* Egginton, 2 B. & P. 508.

In the case before us, the owner of the property, through its agent, Dolan, did not suggest the plan for committing the offence of larceny, which was finally adopted, but the evidence shows conclusively that, by the consent or direction of the packing company, through words or otherwise, he suggested the commission of such an offence, and invited from the accused plans to that end. The fair construction of the evidence is that in the finality the plan was a joint creation of the two, and that it required each to be an active participant in its consummation. It seems that there is good reason for holding that the situation in that respect falls within the condemnatory language in the opinion of the court in Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, cited to our attention by counsel for the plaintiff in error. That will be apparent from the closing words of the opinion, which are as follows:

"A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offence, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

We cannot well escape the conclusion that this case falls under the condemnation of the rule that where the owner of property by himself or his agent, actually or constructively, aids in the commission of the offence, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offence, the would-be criminal is not guilty of all the elements of the offence. Here Mr. Layer, acting for the owner of the property, packed or superintended the packing of the four barrels of meat, as suggested by the owner's agent in the matter, Dolan, and caused the same to be placed on the platform, knowing that the accused would soon arrive to take them, under an arrangement between him and its agent, and directed its platform boss, when he inquired as to the purpose of so placing the barrels, "Let them go; they are for some man, and he will call for them." He, from the standpoint of such employé, directed the latter to deliver the barrels to the man when he called, the same in all respects as was done in Williams *v.* State, *supra.* He substantially made such delivery, by treating the accused when he arrived upon the scene as having a right to take the property, In that the design to trap a criminal went a little too far, at least, in that it included the doing of an act, in effect preventing the taking of the property from being characterized by any element of trespass.

The logical basis for the doctrine above discussed is that there can be no larceny without a trespass. So if one procures his property to be taken by another intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting, and the crime not fully consummated, however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an intention to commit the crime of larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property, as to put him in the position of having consented to the taking. If I induce one to come and take my property, and then place it before him to be taken, and he takes it with criminal intent, or if knowing that one intends to take my property, I deliver it to him, and he takes it with such intent, the essential element of trespass involving nonconsent requisite to a completed offence of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present. Some writers in treating this subject give so much attention to condemning the deception practiced to facilitate and encourage the commission of a crime by one supposed to have such a purpose in view, that the condemnation is liable to be viewed as if the deception were sufficient to excuse the would-be criminal, or to preclude his being prosecuted; that there is a question of good morals involved as to both parties to the transaction, and that the wrongful participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offence of larceny. That is wrong. It is the removal from the completed transaction, which from the mental attitude of the would-be criminal may have all the ingredients of larceny, from the standpoint of the owner of the property of the element of trespass or nonconsent. When such element does not characterize a transaction involving the full offence of larceny, so far as concerns the mental purpose of such would-be criminal is concerned, is often not free from difficulty, and courts of review should incline quite strongly to support the decision of the trial judge in respect to the matter, and not disturb it except in a clear case. It seems that there is such a case before us.

If the accused had merely disclosed to Dolan, his ostensible accomplice, a purpose to improve the opportunity when one should present itself to steal barrels of meat from the packing company's loading platform, and that had been communicated by Dolan to the company, and it had then merely furnished the accused the opportunity he was looking for to carry out such purpose, and he had improved it, the situation would be quite different. The mere fact that the plan for obtaining the property was that of the accused, under the circumstances of this case, is not controlling. Dolan, as an emissary of the packing company, as we have seen, was sent to the accused to arrange, if the latter were so disposed, some sort of a plan for taking some of the company's property with the intention of stealing it. Though the accused proposed the plan, Dolan agreed to it, which involved a promise to assist in carrying it out, ostensibly as an accomplice, but actually as an instrument of the packing company. That came very near, if it did not involve, solicitation by the company, in a secret way, for the accused to take its property as proposed. With the other element added of placing such property on the loading platform for the accused to take pursuant to the agreement, with directions, in effect, to the person in charge of the platform, to let the accused take it when he came for that purpose, we are unable to see any element of trespass in the taking which followed. The packing company went very significantly further than the owner of the property did in Rex *v.* Egginton, *supra,* which is regarded as quite an extreme case. It solicited the opportunity to be an ostensible accomplice in committing the offence of larceny instead of being solicited in that regard, and the property was in practical effect delivered to the would-be thief instead of its being merely placed where he could readily trespass upon the rights of the packing company by taking it. When one keeps in mind the plain distinction between merely furnishing opportunity for the execution of a formed design to commit larceny and negotiations for the purpose of developing a scheme to commit the offence, regardless of who finally proposes the plan jointly adopted, and not facilitating the execution of the plan by placing the property pursuant to the arrangement where it can readily be taken, but in practical effect, at least, delivering the same into the possession of the would-be thief, one can readily see that the element of trespass, involving consent, is present in the first situation mentioned, and not in the last, and that the latter pretty clearly fits the circumstances of this case.

The judgment is reversed, and the cause remanded for a new trial.

SECTION III.

Consent of the Injured Party.

REGINA *v.* CASE.

CROWN CASE RESERVED. 1850.

[*Reported* 4 *Cox C. C.* 220.]

THE following case was reserved by the Recorder of Dover: William Case was tried before me at the last April Quarter Sessions for the borough of Dover, for an assault upon Mary Impitt.

The defendant was a medical practitioner. Mary Impitt, who was fourteen years old, was placed under his professional care by her parents, in consequence of illness, arising from suppressed menstruation; and on the occasion of her going to his house, and informing him she was no better, he observed, "Then I must try further means with you." He then took hold of her, and laid her down in his surgery, lifted up her clothes, and had carnal connection with her, she making no resistance, believing (as she stated) that she was submitting to medical treatment for the ailment under which she labored. The defendant's counsel, in his address to the jury, contended that the girl was a consenting party; therefore, that the charge of assault could not be sustained.

I told the jury that the girl was of an age to consent to a man having carnal connection with her, and that if they thought she consented to such connection with the defendant he ought to be acquitted; but that if they were satisfied she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure, his conduct, in point of law, amounted to an assault.

The jury found the defendant guilty. and he was sentenced to be imprisoned for eighteen calendar months in the borough gaol, where he now remains. I have to pray the judgment of my lords, justices, and others, sitting in a court of appeal, whether my direction to the jury was correct in point of law.

Horn, for the prisoner. The consent of the girl is found; for consenting and not resisting are synonymous. [COLERIDGE, J. — They are clearly used in a different sense here. WILDE, C. J. — If a medical man uses an injurious ointment the patient does not resist its application; but it cannot be said that he consents. ALDERSON, B. — How does this differ from the case of a man pretending to be the husband of the woman?] Fraud is not expressly found in this case. It ought to have been left to the jury expressly to say whether the act done was necessary or proper. It is consistent with the verdict that he may have treated her medically. [ALDERSON, B. — He pretended that that was medicine which was not; hereby that is fraud.] In the notes to R. *v.* Read (1 Den. C. C. 379), it is said, "It seems from R. *v.* Martin (2 Moo. C. C. 123; 9 Car. & P. 213); R. *v.* Banks (8 Car. & P. 574); R. *v.* Meredith (8 Car. & P. 589), first, that the stat. 9 Geo. 4, c. 31, s. 17, does not deprive a girl under ten years of age of the power to consent which she had at common law; secondly, that consequently if she consents to the mere incomplete attempt, such an attempt is not punishable as an assault; thirdly, that it is punishable as an attempt to commit a felony, viz., as a misdemeanor;" and further, "an assault seems to be any sort of personal ill-usage, short of a battery done to another against his consent. Therefore, such act, done with consent, is no breach of the peace or crime." Children of tender age are, therefore, capable of consenting; so is an idiot (R. *v.* Ryan, 2 Cox C. C. 115). [PATTESON, J. — What do you say the jury found?] It is consistent with the verdict that he may have treated her medically. [COLERIDGE, J. — Suppose even that he did the act *bonâ fide* for the purpose which he pretended, would that justify him? Had he a right to pollute the child's body?] Certainly not, morally; but the question is, was it an assault in the eye of the law, there being consent in fact. [PLATT, B. — The girl did not consent to that which was done. She did not know the nature of the act.] In Read's case (1 Den. C. C. 377), the jury found that, from her tender years, the child did not know what she was about. Yet, as they found that she assented, the prisoners were held entitled to an acquittal upon the indictment, which charged them with an assault. [ALDERSON, B. — It must be taken that there was actual consent in that case.] Even if fraud was established, still there was no assault. The doctrine of rape *per fraudem* stands upon the decision of two judges, Alderson, B. and Gurney, B., in R. *v.* Williams (8 Car. & P. 286), and R. *v.* Saunders (*ib.* 265). In those cases the defendants were indicted for rape, and it appearing that the consent of the woman in each case had been obtained under the belief that the man was her husband, the learned judges directed that the prisoners should be acquitted of the charge of rape, but convicted of an assault. [ALDERSON, B. — In the case before me I followed several previous decisions, although I doubted them.] If they were guilty of an assault, and penetration was proved, why were they not guilty of rape? [ALDERSON, B. — Suppose a woman is ravished whilst under the influence of laudanum. I recollect a case before me on the Home Circuit, where, at the time when the offence was committed, the woman was completely insensible from drunkenness. I doubted whether the prisoner ought to be convicted of rape; but upon consultation with Lord Denman I held that he might.] R. *v.* Camplin (1 Den. C. C. 89; 1 Cox C. C. 220), was a somewhat similar case, but different in this, — that the prisoner gave the woman the liquor which made her drunk. He therefore contributed to the production of the state of insensibility during which the offence was committed; and if the woman does not consent as long as she has the power of consenting or resisting, a reasonable inference that she did not consent may be drawn from her previous conduct; the act would be done against "her permanent will," as Lord Denman expressed it in R. *v.* Camplin; but if fraud dispenses with the necessity of resistance, any deceit will have that effect; and it would be an assault if the woman consented, upon a false representation that the man would marry her, or that medically it would be beneficial to her. If a surgeon cuts off a leg or draws a tooth, and the patient consents because he believes that he is being medically treated, could he afterwards indict him for an assault? Again, the charge of rape includes an assault; and is there to be one kind of consent for an assault and another kind of consent to get rid of the charge of rape? The cases, therefore, it is submitted, deserve to be reconsidered. [WILDE, C. J. — There are two cases which clearly show that this defendant was guilty of an assault, and you say that the court ought to have held him guilty of rape; but it would not be less an assault if it should be held to be rape.] If upon an indictment for assault a rape is proved, the misdemeanor merges in the felony; but it is held that if the connection takes place by consent obtained by fraud it is not rape. If not, neither is it an assault.

Barrow, contra, was not called upon.

WILDE, C. J. I have no doubt in this case that the direction of the learned recorder was perfectly correct. The objection is to the latter part of the charge; for he first of all tells the jury that the girl was of an age to consent, and that, if she consented, the prisoner must be acquitted. Therefore, he treats her as competent to consent, and her consent as a ground of acquittal; but then, that direction is qualified by what he adds afterwards, — that if they were satisfied that she was ignorant of the nature of the act, and made no resistance solely from a *bonâ fide* belief that the defendant was, as he represented, treating her medically with a view to her cure, his conduct amounted to an assault. That is the part which is objected to. The jury found the prisoner guilty. The girl was of an age at which she might be totally ignorant of the nature of the act, morally or religiously, and of the effect which it might have upon her character and station in life; and she was sent by her parents to the defendant to be medically treated by him. It is said that he may have treated her medically; if so, can it be said that he did not commit both a legal and ecclesiastical offence? But the jury must, I think, be taken to have found that it was not medical treatment. I admit that the question was not put to them; nor was it necessary, because, whether the defendant thought it would be beneficial or not, his act was altogether improper and unjustifiable. He was guilty of a great offence. He in truth disarms the girl; and she submits under a misrepresentation that it was some act necessary and proper for her cure; she made no resistance to an act which she supposed to be quite different from what it was; what she consented to was something wholly different from that which was done, and, therefore, that which was done, was done without her consent. I am not prepared to say that the two cases referred to might not be cases of rape; for every rape includes an assault; but it is not necessary to decide that question now.

ALDERSON, B. This is quite undistinguishable from the two cases decided by myself and my brother Gurney, which were only the sequel of many others previously decided. When a man obtains possession of the person of a woman by fraud, it is against her will; and if the question were *res nova*, I should be disposed to say that this was a rape, but that is not necessary in this case. This is an indictment for an assault, and the prisoner obtains the consent of the child by representing the act as something different from what it was.

PATTESON, J. Mr. Horn confounds active consent and passive non-resistance, which, I think, the learned recorder has very accurately distinguished. Here the girl did not resist; but still there was no consent.

COLERIDGE, J. The girl was under medical treatment, and she makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent the defendant's act would have been indisputably an assault; and under the circumstance, therefore, his conduct amounted to an assault according to cases which I should be sorry to see infringed.

PLATT, B. I think my brother Patteson has pointed out the fallacy of Mr. Horn's argument as to consent. The girl consents to one thing, and the defendant does another; that other involving an assault.[1]

Conviction affirmed.

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[1] *Acc.* Rex *v.* Nichols, Russ. & Ry. 130; Rex *v.* Rosinski, 1 Moody, 19; Reg. *v.* Woodhurst, 12 Cox C. C. 443; Reg. *v.* Lock, L. R. 2 C. C. R. 10. — ED.

REGINA *v.* CLARENCE.

CROWN CASE RESERVED. 1888.

[*Reported* 16 *Cox C. C.* 511, 22 *Q. B. D.* 23.]

WILLS, J.,[1] read the following judgment: The prisoner in this case has been convicted (1) of "an assault" upon his wife, "occasioning actual bodily harm," under sect. 24 & 25 Vict. c. 100, s. 47; and (2) of "unlawfully and maliciously inflicting" upon her "grievous bodily harm" under sect. 20 of the same statute. The facts are that he was, to his knowledge, suffering from gonorrhœa; that he had marital intercourse with his wife without informing her of the fact; that he infected her, and that from such infection she suffered grievous bodily harm. The question is, whether he was rightly convicted upon either count. First, was he guilty of an assault? In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband; that had the wife known that her husband was diseased she would not have consented; that the husband was guilty of a fraud in concealing the fact of his illness; that her consent was therefore obtained by fraud, and was therefore no consent at all, and, as the act of coition would imply an assault if done without consent, he can be convicted. This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent; it only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft. A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different that the wife's submission without knowledge of the facts is no consent at all. It is said that such a case rests upon the same footing with the consent to a supposed surgical operation or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion as to whether it did or did not amount to the crime of rape; but as it certainly would now be rape by virtue of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, I treat it as so settled. A third way of putting the case is, that inasmuch as the act done amounts to legal cruelty according to the doctrines formerly of the Ecclesiastical Courts, and now of the Divorce Court, it cannot be said to be within the consent implied by the marital relation. These different ways of putting the argument in favor of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done, — a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first, it is the fraudulent suppression of the truth which destroys the consent *de facto* given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second, it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material, not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court. It makes a great difference upon which of these grounds a conviction is supported. Each of them covers an area vastly greater than the ground occupied by the circumstances of the present case. If the first view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, is guilty of assault, and, as it seems to me, therefore, of rape. If the second view be correct, it applies in similar events just as much to unmarried as to married people, unless the circumstances should establish that the parties were content to take their chances as to their respective states of health; and the allegation that a man had given an assurance to a prostitute before having intercourse with her that he was sound when he was not so in fact, might be a ground for putting him upon a trial for rape. If the third view be correct, it places the married man, in the eye of the criminal law, in a much worse position than the unmarried, and makes him guilty of an assault, and possibly of rape, when an unmarried man would not be liable to the same consequences. It may be said that, from the moral point of view, his case is the worse; but there are two sides to this as to most other questions. The man who goes out of his way to seek intercourse under such circumstances — and, be it remembered that the hypothesis I am now dealing with assumes knowledge of his condition on the part of the man — is without excuse. There may be many excuses for the married man suggested by the modes of life with which poverty and overcrowding have to do. We are thus introduced, as it seems to me, to a set of very subtle metaphysical questions.

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[1] Part of each opinion, not involving the question of assault, is omitted.

If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representing that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse by suppressing the fact that the man is diseased is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is, or as to what is being done, or to misrepresentations of a thousand kinds in respect of which it has never yet occurred to any one to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready to accept the embraces of a man stricken with small-pox or leprosy. Take, for example, the case of a man without a single good quality, a gaol-bird, heartless, mean, and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man ot good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervor, effecting the ruin of his victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed, than there is between the man bodily sound and the man afflicted with a contagious disease. Is there to be a distinction in this respect between an act of intercourse with a wife who on this special occasion would have had a right to refuse her consent, and certainly would have refused it had she known the truth, and the intercourse taking place under the general consent inferred from a bigamous marriage obtained by the false representation that the man was capable of contracting a legal marriage? In such a case the man can give no title of wife to the woman whose person he obtains by the false representation that he is unmarried, and by a ceremony which, under the circumstances, is absolutely void. Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband, but who is none? Many women would think that, of two cruel wrongs, the bigamist had committed the worse. These are but specimens of the questions which must be faced before the circumstances of the present case can be pronounced to constitute an assault; and such considerations lead one to pause on the threshold and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act. The description of the offence constituted by sect. 47 is as follows: "Whoever shall be convicted of an assault occasioning actual bodily harm." The section is the last of a group of twelve headed "Assaults." None of them except sect. 43 implies that any distinction between males and females is thought of, and that section points to nothing of a sexual character. It merely provides that in cases of assault upon males under fourteen and upon females generally, if the assault or battery is of such an aggravated character that it cannot in the opinion of the justices be sufficiently punished as a common assault or battery, it shall be lawful for them to inflict a heavier punishment. Indecent assaults, as such, upon females are dealt with by sect. 52, and upon males by sect. 62, and there is therefore no ground for supposing that anything specially between the sexes is pointed at either by this section, or by any of those in the group to which it belongs. The next group of eight sections (48–55) is headed "Rape, abduction, or defilement of women," and deals specially with sexual crimes. Surely this was the place in which to find an enactment dealing with the very peculiar circumstances now before us, and it cannot really have been intended that they should be embraced by a section whose terms are applicable to, and as it seems to me satisfied by, the class of cases which would naturally occur to one's mind, those of direct violence. The worst of the contagious diseases of this class has, I believe, been known in this country for close upon four centuries. The circumstances which have happened in this case cannot have been of infrequent occurrence during that interval, and cannot have failed justly to give rise to the bitterest resentment. It seems to my mind a very cogent argument against the conviction that, if the view of the law upon which it is founded be correct, thousands of offending husbands, and as I think also of offending wives, must have rendered themselves amenable to the criminal law; and yet it was reserved for the year 1866, when Reg. *v.* Bennett (4 F. & F. 1105) was decided, to discover that such transgressors might have been indicted and criminally dealt with during all that long period. It is true that women take a different place in social position, and have by Act of Parliament many rights and by common usage much social liberty which no one would have claimed for them centuries ago. This fact, however, seems to me a strangely insufficient reason for a new reading of the criminal law fraught with consequences which no one can deny to be of a very serious and widespread character. The principle upon which a conviction in this case must be upheld will or will not apply to the intercourse of unmarried, as well as of married, men and women, according to the ground or grounds selected upon which to justify it. If it is based upon the notion of cruelty as understood in the Divorce Court, the case of the unmarried man and woman falls without its purview. If suppression of the truth be a material element in the inquiry, actual misrepresentation on the subject of health would put an unmarried man or woman in the same position as the married man or woman who conceals that fact against which the married state ought to be a sufficient guarantee. I intentionally refer to women as well as men, for it is a great mistake to look at questions of this kind as if sexual faults and transgressions were all on the side of one sex. The unmarried woman who solicits and tempts a perhaps reluctant man to intercourse which he would avoid like death itself if he knew the truth as to her health, must surely, under some circumstances at least, come under the same criminal liability as the same man. If, again, the conviction be upheld on the ground of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most, cases of seduction and to other forms of illicit intercourse, including at least theoretically the case of prostitution; and if such difference be the true ground upon which to base a confirmation of the conviction, knowledge of his or her condition on the part of the person affected is immaterial. It is the knowledge or want of knowledge on the part of the person who suffers from contagion alone that is the material element. Surely these considerations point to the conclusion that a wide door will be opened to inquiries not of a wholesome kind, in which the difficulties in the way of arriving at truth are often enormous, and in which the danger of going wrong is as great as it is by people in general inadequately appreciated. A new field of extortion may be developed, and very possibly a fresh illustration afforded of the futility of trying to teach morals by the application of the criminal law to cases occupying the doubtful ground between immorality and crime, and of the dangers which always beset such attempts. Of course, if by legislation such cases should be brought within the criminal law, all we shall have to do will be to face the difficulties and do our best to administer the law. It seems to me, however, that such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the Legislature and the Legislature only. I understand the process of expansion by which the doctrines of the common law are properly made by judicial construction to apply to altered modes of life and to new circumstances and results thus brought about which would have startled our ancestors could they have foreseen them. I do not understand such a process, and I do not think it legitimate, when every fact and every circumstance which goes to constitute the alleged offence is identical with what it has been for many hundreds of years past. Whether further legislation in this direction is desirable is a question for legislators rather than lawyers, and the only remark that I desire to make upon this subject is that, apart from cases of actual violence, and of children so young that the very fact of touching them in the way of sexual relation may fairly be treated as a crime, the mysteries of sexual impulses and intercourse are well nigh insoluble, and the difficulty of arriving at the truth in the case of imputed misconduct enormous; and I doubt whether they can be thoroughly appreciated without the experience gained by trying cases of intercourse with girls near the age of sixteen, and they certainly suggest the necessity of the utmost care in dealing by way of legislation with the subject under discussion. If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, — a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I cannot understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent or even a distant approach to it. I greatly prefer the reasoning of those who say that, because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me. I am well aware of the respect due to the opinion of the very learned judges from whom I differ; but I cannot help saying that to me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. In other words, it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it; and an assault which includes penetration does not seem to me, under such circumstances, to be anything but rape. Of course, the thing done in the present case is wicked and cruel enough. No one wishes to say a word in palliation of it. But that seems to me to be no reason for describing it as something else than it is, in order to bring within the criminal law an act which, up to a very recent time, no one ever thought was within it. If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault because no mischief ensues to the woman, nor, indeed, where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there might be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. In all such cases, therefore, apart from the suggested impossibility of rape upon a wife, rape must be committed, and a great many rapes must be constantly taking place without either of the parties having the least idea of the fact. The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having small-pox or scarlet fever, or other like diseases quite free from the sexual element, and whilst so afflicted coming into a personal contact with others which would certainly have been against the will of those touched had they known the truth. This species of assault, if assault it be, must have been of much longer standing than the four centuries I have alluded to, and it involves no considerations depending upon the social status of women, yet no one has ever been prosecuted for an assault so constituted. But upon this point I desire only to express my concurrence in the observations of my brother Stephen, which I have had the opportunity of reading. I wish to observe that, if an assault can be committed by coition to which consent has been procured by suppression of the truth or misrepresentation as to the state of health of one of the parties, questions of the kind I have indicated will be triable, may be tried now at petty sessions. The observation is not, of course, conclusive; but it is well to appreciate whither a conviction in the present case must lead us, not only as regards the subject-matter of the criminal law, but as to the tribunals which will have to administer it. When the Act of 1861 (24 & 25 Vict. c. 100) was passed, it had never occurred to any human being, so far as our legal history affords any clue, that the circumstances now under consideration constituted an assault. The term is as old as any in our law, but it had never been so applied. The doctrine owes its origin to the remarks of Willes, J., at the Taunton Assizes, held in 1866, and reported in Reg. *v.* Bennett (4 F. & F. 1105). It was pointed out in the Irish case of Hegarty *v.* Shine (Ir. L. Rep. 2 C. L. 273; C. A. Ir. L. Rep. 4 C. L. 288) that the conviction might be upheld, on the ground that the girl was, as she alleged, asleep when intercourse took place, and therefore gave no consent. In spite of all my respect for everything that fell from the lips of that very great lawyer, I am compelled to think that it was a case in which he strained the law for the purpose of punishing a great wrong, and I confess myself unable to follow his view, that the thing done in that case might be an assault and yet not a rape. Were it, however, possible that the mere words of the section would apply to the transaction in question, and that it were capable of being described as an assault, I am still of opinion that the context shows that sexual crimes were intended to be dealt with as a class by themselves, the only rational way of legislating upon such a subject; and if the letter of the section could be satisfied by the present circumstances, there never was a case to which the maxim *Qui hæret in literâ hæret in cortice* more emphatically applied.

Hawkins, J., read the following judgment: I am of opinion that the prisoner was rightly convicted upon both counts of the indictment. The first count was framed under sect. 20 of 24 & 25 Vict. c. 100, and charged the prisoner with "unlawfully and maliciously inflicting grievous bodily harm" upon Selina Clarence. The second count was framed under sect. 47 of the same Act, and charged him with an "assault" upon the said Selina Clarence, "occasioning" her "actual bodily harm." At the time of the committing of the offences charged Selina Clarence was and still is the wife of the prisoner. At that time the prisoner was suffering from gonorrhœa, as he knew, but his wife was ignorant of the fact. In this condition of things the prisoner had sexual intercourse with his wife, and in so doing communicated to her his disease, and thereby caused her grievous bodily harm. It must also be taken as a fact that, had the prisoner's wife known that he was so suffering she would have refused to submit to such intercourse. On the prisoner's behalf it was contended that the conviction was wrong upon several grounds: first, that the injury caused to the wife was the result of a lawful act, viz., the sexual communion of a husband with his wife; secondly, that the charge in the first count involved, and that in the second count was based on, an assault, and that no assault could be committed by a husband in merely exercising his marital right upon the person of his wife; and, thirdly, that the sections of the statute under which the indictment was framed had no application to such circumstances as those above mentioned. About the unlawfulness and maliciousness of the prisoner's conduct it seems to me impossible to raise a doubt. It has long been established by authority that, if a husband knowingly communicates to his wife a venereal disease, such misconduct amounts to legal cruelty, and is ground for judicial separation; and, in the absence of evidence to the contrary, it may be presumed that a man suffering under venereal disease knows it, and knows also that, if he has communion with his wife, he will in all human probability communicate his malady to her (see Brown *v.* Brown, L. Rep. 1 P. & D. 46). It is equally clear that wilfully to do an unlawful act to the prejudice of another is to do it maliciously. We have, then, these elements established, grievous bodily harm unlawfully and maliciously caused. . . . I proceed now to consider the question whether there was in fact an assault by the prisoner on his wife occasioning her either grievous or actual bodily harm. I answer this question also in the affirmative. By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. Lord Stowell, in Popkin *v.* Popkin, cited in Durant *v.* Durant (1 Hagg. Eccl. Rep. 767), said: "The husband has a right to the person of his wife, but not if her health is endangered." So, to endanger her health, and cause her to suffer from loathsome disease contracted through his own infidelity cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and, although I can cite no direct authority upon the subject, I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power — nay, even to the death, if necessary — the sexual embraces of a husband suffering from such contagious disorder. In my judgment, wilfully to place his diseased person in contact with hers without her express consent amounts to an assault. It has been argued that, to hold this, would be to hold that a man who, suffering from gonorrhœa, has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful; but there is a wide difference between a simple act of communion which is lawful and an act of communion combined with infectious contagion endangering health and causing harm which is unlawful. It may be said that, assuming a man to be diseased, still, as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and therefore cannot be criminal. My reply to this argument is that if a person, having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege, and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct. I may further illustrate my view upon this part of the case by applying, by way of test, to an indictment for assault the old form of civil pleadings. Thus: Indictment for an assault; plea of justification, that the alleged assault was the having sexual communion with the prosecutrix, she being the prisoner's wife; new assignment, that the assault charged was not that charged in the plea, but the unlawful and malicious contact of her person with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment? I ought perhaps to state that, even if to hold a husband liable for an assault under such circumstances would be to subject him also to a charge of rape, the opinion I have above expressed would not be changed. No jury would be found to convict a husband of rape on his wife except under very exceptional circumstances, any more than they would convict of larceny a servant who stealthily appropriated to her own use a pin from her mistress's pincushion. I can, however, readily imagine a state of circumstances under which a husband might deservedly be punished with the penalty attached to rape, and a person committing a theft even of a pin to the penalty attached to larceny. The cases put of a person suffering from smallpox, diphtheria or any other infectious disorder, thoughtlessly giving a wife or child a mere affectionate kiss or shake of the hand from which serious consequences never contemplated ensued, seem to me cases in which it is impossible to suppose any criminal prosecution would be tolerated, or could, if tolerated, result in a conviction; but I can picture to myself a state of things in which a kiss or shake of the hand given by a diseased person, maliciously with a view to communicate his disorder, might well form the subject of criminal proceedings. I will not, however, stop to discuss such imaginary cases further. The case of Reg. *v.* Bennett (4 F. & F. 1105), decided in 1866, is an authority directly in support of the view I have taken. The indictment was for an indecent assault on a girl who had consented to sleep with the prisoner, who had connection with her, and communicated to her a foul disease. Willes, J., before whom the case was tried, in summing-up, told the jury that, though it would have been impossible to have established rape, yet if the girl did not consent to the aggravated circumstances — *i. e.*, to connection with a diseased man — his act would be an assault. Willes, J., no doubt, according to the report, based his observations upon the rule that fraud vitiates consent; but it is clear his mind was alive to the point I have been considering, viz., that, though there might be such consent to sexual intercourse as to make the connection no rape, nevertheless, the infectious contact might amount to an assault. See also Hegarty *v.* Shine, 14 Cox C. C. 124; s. c. C. A. ib. 145; and Reg. *v.* Sinclair, 13 Cox C. C. 28. In dealing with this case my judgment is not based upon the doctrine that fraud vitiates consent, because I do not think that doctrine applies in the case of sexual communion between husband and wife. The sexual communion between them is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons. My judgment is based on the fact that the wrongful act charged against the prisoner was not involved in or sanctioned by his marital privilege, and was one for which no consent was ever given at all. For this reason it is unnecessary to discuss or express any opinion upon the various cases cited during the argument relating to connection obtained by fraud, and I accordingly abstain from doing so. Another argument used for the prisoner was that such cases as the present were not contemplated by the statute under which he was indicted, and it was also said that, if it had been intended that the communication of a venereal disease to a woman during an act of sexual intercourse, consented to by her, should be punishable as a crime, some special enactment to that effect would have been introduced into one or other of the Acts of Parliament relating to women and offences against them. This is an argument to which I attach no weight, assuming the facts bring the case within the fair interpretation of the sections to which I have referred. Moreover, I may point out that Reg. *v.* Bennett (4 F. & F. 1105), to which I have referred, was tried in the year 1866, and it is strange, if the law as there laid down was thought to be contrary to the law of the land or to the intention of the Legislature, that in no subsequent legislation during the twenty-two years which have since elapsed has any enactment been introduced in which any expression is to be found indicative of a disapproval of that decision or that the intention of the statute was at variance with it. I think the Legislature contemplated the punishment of all grievous bodily harm, however caused, if caused unlawfully and maliciously; and I cannot bring my mind for an instant to believe that, even had the circumstances before us been present to the minds of the framers of the Act, they would have excluded from its operation an offence as cruel and as contrary to the obligation a man owes to his wife to protect her from harm as can well be conceived. It has been urged that the case of husband and wife does not differ from that of unmarried persons, and that to affirm this conviction would tend to encourage undesirable prosecutions where disease has been communicated during illicit communion. I do not by any means assent to these propositions. I think the two cases are substantially different. The wife submits to her husband's embraces because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but in mere submission to an obligation imposed upon her by law. Consent is immaterial. In the case of unmarried persons, however, consent is necessary previous to every act of communion, and if a common prostitute were to charge with a criminal offence a man who, in having had connection with her had infected her with disease, few juries would under ordinary circumstances hesitate to find that each party entered into the immoral communion tacitly consenting to take all risks. In the case of women other than prostitutes, the circumstances of each particular case would have to be considered, and the question how far fraud vitiates consent to such communion would also have to be dealt with. In such cases, too, shame would deter most decent women from appealing to the law; and, if a man were the sufferer, seldom would he incur the ridicule and exposure which would be brought upon him. Considering how few prosecutions have been instituted for such causes since the decision in Reg. *v.* Bennett (4 F. & F. 1105), and entertaining moreover, as I do, a doubt whether any person, man or woman, could, as against the public interests, consent to the infliction of grievous bodily harm, so as to give a legal defence to a criminal prosecution, although such consent might afford a good defence to a civil action, I do not see any reason for such fears on the subject as have been entertained. Anyhow they cannot affect the law. Fortified in my opinion, as I believe myself to be, by the plain words of the statute, and by the authority of Willes, J., one of the greatest and most accurate lawyers of modern times, I have arrived at the conclusion that this conviction is right and in accordance with the law, and I cannot therefore be a party to a judgment which in effect would proclaim to the world that by the law of England in this year 1888 a man may deliberately, knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocious barbarity. I may state that this judgment has been read by my brother Day, who requests me to say that he thoroughly concurs in it.[1]

REGINA *v.* BARROW.

CROWN CASE RESERVED. 1868.

[*Reported L. R.* 1 *Crown Cases Reserved*, 156.]

THE following case was stated by Kelly, C. B.: —

This was an indictment for a rape. The question is whether the offence as proved amounted in point of law to a rape. This question depended entirely upon the evidence of the prosecutrix, Harriet Geldart, which was as follows: —

"I and my husband lodge together at William Garner's. We sleep upstairs on the first floor, and were in bed together on the night of Saturday, the 21st of June. I went to bed about 12 o'clock, and about 2 o'clock on Sunday morning I was lying in bed, and my husband beside me. I had my baby in my arms, and was between waking and sleeping. I was completely awakened by a man having connection with me, and pushing the baby aside out of my arms. He was having connection with me at the moment when I completely awoke. I thought it was my husband, and it was while I could count five after I completely awoke before I found it was not my husband. A part of my dress was over my face, and I got it off, and he was moving away. As soon as I found it was not my husband, I pulled my husband's hair to wake him. The prisoner jumped off the bed."

On cross-examination she added, "Till I got my dress off my face I thought it was my husband. After he had finished I pulled the dress off my face. I was completely awakened by the man having connection with me and the baby being moved." On re-examination she said, "The baby was pushed on further into the bed."

The jury found this evidence, as I have stated it, to be true.

Upon these facts the prisoner's counsel, Mr. Cottingham, submitted that the indictment was not sustained, and quoted 1 Russell on Crimes, ed. of 1843, p. 677; Rex *v.* Jackson, Russ. & Ry. 487; Reg. *v.* Saunders, 8 C. & P. 265; Rex *v.* Williams, 8 C. & P. 286; Reg. *v.* Camplin, 1 Den. C. C. 89. Reg. *v.* Fletcher, 8 Cox C. C. 131, was also referred to.

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[1] SMITH, STEPHEN, and MANISTY, JJ., POLLOCK, B., and COLERIDGE, C. J., also delivered opinions against the conviction. MATHEW and GRANTHAM, JJ., and HUDDLESTON, B., agreed. FIELD, J., also delivered an opinion supporting the conviction, and DAY and CHARLES, JJ., agreed. See, *contra*, Reg. *v.* Bennett, 4 F. & F. 1105; Reg. *v.* Sinclair, 13 Cox C. C. 28. — ED.

I thought, especially on the authority of the judgment delivered by Lord Campbell in Reg. *v.* Fletcher, 8 Cox C. C. 131, that the case was made out, inasmuch as it was sufficient that the act was done by force and without consent before or afterwards; that the act itself, coupled with the pushing aside the child, amounted to force; and there was certainly no consent before, and the reverse immediately afterwards; but I reserved the point for the Court of Criminal Appeal.

No counsel appeared on either side.

BOVILL, C. J. We have carefully considered the facts as stated in this case. It does not appear that the woman, upon whom the offence was alleged to have been committed, was asleep or unconscious at the time when the act of connection commenced. It must be taken, therefore, that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls, therefore, within the class of cases which decide that, where consent is obtained by fraud, the act done does not amount to rape.

CHANNELL, B., BYLES, BLACKBURN, and LUSH, JJ., concurred.[1]

Conviction quashed.

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[1] Now, rape being defined to be sexual connection with a woman without her consent, or without and therefore against her will, it is essential to consider what is meant and intended by consent. Does it mean an intelligent, positive concurrence of the will of the woman, or is the negative absence of dissent sufficient? In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connection, being of a wholly different character; there is no *consensus quoad hoc.* In the case of personation there is no *consensus quoad hanc personam.* Can it be considered that there is a consent to the sexual connection, it being manifest that, had it not been for the deceit or fraud, the woman would not have submitted to the act? In the cases of idiocy, of stupor, or of infancy, it is held that there is no legal consent, from the want of an intelligent and discerning will. Can a woman, in the case of personation, be regarded as consenting to the act in the exercise of an intelligent will? Does she consent, not knowing the real nature of the act? As observed by Mr. Curtis, she intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place. Therefore the connection was done, in my opinion, without her consent, and the crime of rape was constituted. I therefore am of opinion that the conviction should stand confirmed.— MAY, C. J., in Reg *v.* Dee, 15 Cox C. C. 579, 587.

In accordance with the principal case, see Reg. *v.* Fletcher, 10 Cox C. C. 248; Don Moran *v.* People, 25 Mich. 356; Wyatt *v.* State, 2 Swan, 394.—ED.

WRIGHT'S CASE.

LEICESTER ASSIZES. 1604.

[*Reported Co. Lit.* 127 *a.*]

In my circuit in *anno* 1 *Jacobi regis,* in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined, and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid.

COMMONWEALTH *v.* STRATTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[*Reported* 114 *Massachusetts,* 303.]

Indictments, each charging that the defendant, upon a certain young woman in the indictment named, made an assault and administered to her a large quantity of cantharides, "the same being . . . a deleterious and destructive drug," with intent to injure her health, whereby she became sick, and her life was despaired of. Both cases were tried together.

It appeared at the trial in the Superior Court, before Devens, J., that the defendant, in company with another young man, called upon the young women in the indictments named, and during the call offered them some figs, which they ate, they having no reason to suppose that the figs contained any foreign substance; that a few hours after, both young women were taken sick, and suffered pain for some hours; that the defendant and his companion had put into the figs something they had procured by the name of "love powders," which was represented by the person of whom they got it to be perfectly harmless.

There was evidence that one of the ingredients of these powders was cantharides, and that this would tend to produce sickness like that which the young women suffered.

The Court instructed the jury that if it was shown beyond a reasonable doubt "that the defendant delivered to the women a harmless article of food, as figs, to be eaten by them, he well knowing that a foreign substance or drug was contained therein, and concealing the fact, of which he knew the women to be ignorant, that such foreign substance or drug was contained therein, and the women eating thereof by the invitation of the defendant were injured in health by the deleterious character of the foreign substance or drug therein contained, the defendant should be found guilty of an assault upon them, and this, although he did not know the foreign substance or drug was deleterious to health, had been assured that it was not, and intended only to try its effect upon them, it having been procured by him under the name of a 'love powder,' and he being ignorant of its qualities or of the effects to be expected from it."

The jury found the defendant guilty of a simple assault in each case, and he alleged exceptions.

W. Colburn, for the defendant.

C. R. Train, Attorney-General, for the Commonwealth.

Wells, J. All the judges concur that the evidence introduced at the trial would warrant a conviction of assault and battery or for a simple assault, which it includes; and in the opinion of a majority of the court, the instructions given required the jury to find all that was essential to constitute the offence of assault and battery.

The jury must have found a physical injury inflicted upon another person by a voluntary act of the defendant directed toward her, which was without justification and unlawful. Although the defendant was ignorant of the qualities of the drug he administered and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, yet he knew it was not ordinary food, that the girl was deceived into taking it, and he intended that she should be induced to take it without her conscious consent, by the deceit which he practised upon her. It is to be inferred from the statement of the case that he expected that it would produce some effect. In the most favorable aspect of the facts for the defendant he administered to the girl, without her consent and by deceit, a drug or "foreign substance," of the probable effect of which he was ignorant, with the express intent and purpose "to try the effect of it upon" her. This in itself was unlawful, and he must be held responsible for whatever effect it produced. Being an unlawful interference with the personal rights of another, calculated to result and in fact resulting in physical injury, the criminal intent is to be inferred from the nature of the act and its actual results. 3 Bl. Com. 120; Rex *v.* Long, 4 C. & P. 398, 407, note. The deceit, by means of which the girl was induced to take the drug, was a fraud upon her will, equivalent to force in overpowering it. Commonwealth *v.* Burke, 105 Mass. 376; Regina *v.* Lock, 12 Cox C. C. 244; Regina *v.* Sinclair, 13 Cox C. C. 28.

Although force and violence are included in all definitions of assault, or assault and battery, yet where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. In 3 Chit. Crim. Law, 799, is a count, at common law, for an assault with drugs. For other instances of assault and battery without actual violence directed against the person assaulted, see 1 Gabbett's Crim. Law, 82; Rosc. Crim. Ev. (8th ed.) 296; 3 Bl. Com. 120 and notes; 2 Greenl. Ev. § 84.

If one should hand an explosive substance to another and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault, if the substance failed to explode or failed to cause any injury. It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.

In Regina *v.* Button, 8 C. & P. 660, one who put Spanish flies into coffee to be drunk by another was convicted of an assault upon the person who took it, although it was done "only for a lark." This decision is said to have been overruled in England. Regina *v.* Dilworth, 2 Mood. & Rob. 531; The Queen *v.* Walkden, 1 Cox C. C. 282; Regina *v.* Hanson, 2 C. & K. 912. In the view of the majority of the court, the last only of these three cases was a direct adjudication, and that entirely upon the authority of mere *dicta* in the other two and without any satisfactory reasoning or statement of grounds; and the earlier decision in Regina *v.* Button is more consistent with general principles, and the better law.[1] *Exceptions overruled.*

REGINA *v.* MARTIN.

CROWN CASE RESERVED. 1840.

[*Reported* 2 *Moody*, 123.]

THE prisoner was tried before Mr. Baron Alderson upon an indictment, the first count of which charged him with carnally knowing and abusing Esther Ricketts, a girl above ten and under twelve years of age.

The second count was for an assault on Esther Ricketts with intent carnally to know and abuse her. The third count was for a common assault.

Godson, for the prisoner, contended that, supposing the fact to have been done by the consent of the prosecutrix, no conviction could take place on the second and third counts.

The learned judge left the question to the jury, who found the fact that the prosecutrix had consented; and he then directed a verdict of guilty on the ground that the prosecutrix was by law incapable of giving her consent to what would be a misdemeanor by statute.

But as *Godson* stated that the point was doubtful and had been otherwise decided before, the learned judge respited the judgment.

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[1] *Acc.* Carr *v.* State (Ind.), 34 N. E. 533. — ED.

It appeared to the learned judge clear that if the indictment had charged an attempt to commit the statutable misdemeanor, the prisoner would clearly have been liable to conviction; but the learned judge was not free from doubt as to the present case, in which an assault was charged.

This case was considered at a meeting of the judges in Hilary term, 1840, and they all thought that the proper charge was of a misdemeanor in attempting to commit a statutable offence, and that the conviction was wrong.[1]

REGINA v. BRADSHAW.

LEICESTER ASSIZES. 1878.

[*Reported* 14 *Cox C. C.* 83.]

WILLIAM BRADSHAW was indicted for the manslaughter of Herbert Dockerty, at Ashby-de-la-Zouch, on the 28th day of February.

The deceased met with the injury which caused his death on the occasion of a football match played between the football clubs of Ashby-de-la-Zouch and Coalville, in which the deceased was a player on the Ashby side, and the prisoner was a player on the Coalville side. The game was played according to certain rules known as the "Association Rules."[2] After the game had proceeded about a quarter of an hour, the deceased was "dribbling" the ball along the side of the ground in the direction of the Coalville goal, when he was met by the prisoner, who was running towards him to get the ball from him or prevent its further progress; both players were running at considerable speed; on approaching each other, the deceased kicked the ball beyond the prisoner, and the prisoner, by way of "charging" the deceased, jumped in the air and struck him with his knee in the stomach. The two met, not directly but at an angle, and both fell. The prisoner got up unhurt, but the deceased rose with difficulty and was led from the ground. He died next day after considerable suffering, the cause of death being a rupture of the intestines.

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[1] "It is a presumption of law that a girl under ten years of age is incapable of consenting to the offence of rape (Pen. Code, sec. 261); and as such an offence includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under ten years of age is incapable in law of consenting to the assault in connection with the attempt to commit the offence. Whether the girl in fact consented or resisted is therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act." MCKEE, J., in People *v.* Gordon, 70 Cal. 467, 468. — ED.

[2] *Etherington Smith*, in opening the case for the prosecution, was proceeding to explain the "Association Rules" to the jury, and to comment upon the fact of whether the prisoner was or was not acting within those rules, when Bramwell, L. J., interposed, saying, "Whether within the rules or not the prisoner would be guilty of manslaughter if while committing an unlawful act he caused the death of the deceased."

Witnesses were called from both teams whose evidence differed as to some particulars, those most unfavorable to the prisoner alleging that the ball had been kicked by the deceased and had passed the prisoner before he charged; that the prisoner had therefore no right to charge at the time he did; that the charge was contrary to the rules and practice of the game and made in an unfair manner, with the knees protruding; while those who were more favorable to the prisoner stated that the kick by the deceased and the charge by the prisoner were simultaneous, and that the prisoner had therefore, according to the rules and practice of the game, a right to make the charge, though these witnesses admitted that to charge by jumping with the knee protruding was unfair. One of the umpires of the game stated that in his opinion nothing unfair had been done.[1]

Bramwell, L. J., in summing up the case to the jury, said: "The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourselves with the rules of football. But, on the other hand, if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act, and you must find him guilty; if you are of a contrary opinion you will acquit him." His lordship carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger. *Verdict, Not guilty.*

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[1] Arguments of counsel are omitted.

COMMONWEALTH *v.* COLLBERG.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[*Reported* 119 *Mass.* 350.]

Two indictments: one for an assault and battery by Benjamin F. Collberg upon Charles E. Phenix; and the other for an assault and battery by Phenix upon Collberg. Both indictments were founded upon and supported by the same evidence.

At the trial of the two indictments in the Superior Court before Lord, J., there was evidence for the Commonwealth tending to show that about six o'clock on the evening of Sunday, August 22, 1875, Collberg and Phenix met near the station of the Boston and Maine Railroad in Malden and had a slight altercation, as a result of which Collberg bantered Phenix to fight him; that Phenix declined on the ground that he did not want to fight with his best clothes on, but said that if Collberg would wait until he could go home and change his clothes, they would go to some place outside of the town and settle it; that thereupon Phenix did go home and change his clothes, and he and Collberg met at a retired place, remote from habitations and thoroughfares, and fought with each other in the presence of some fifty or seventy-five persons who had gathered there, and that the fight continued until Collberg said that he had enough, when it ceased and the parties went home; that the next day Collberg and Phenix were a good deal bruised and looked as if they had been fighting.

The defendants testified that they had been acquainted with each other for a period of five or six years, during which time they had always been on the most friendly terms, and were so at the time of the act complained of, and subsequently; that during the period of their acquaintance they had engaged at various times in wrestling-matches with each other, all of which had been carried on in a friendly spirit and without engendering any ill feeling between them; that on the day mentioned in the indictment they met towards evening near the station of the Boston and Maine Railroad in Malden, where they had some talk about a recent wrestling-match that had taken place in New York, and growing out of this, as to previous contests of this character which had taken place between them; that after some talk about their matches, they agreed to go then to some place where they should not disturb any one and have another trial of their agility and strength in this direction; that they shortly afterwards went to such a place and engaged in a "run and catch" wrestle with each other, without any anger or malice, or any intention to do each other bodily harm; that any injuries which they inflicted upon each other were inflicted accidentally and by mutual consent while voluntarily continuing in such contest.

There was no evidence of any uproar or outcries when the contest took place, or that any one was disturbed thereby, except that the parties were fighting in presence of a crowd of from fifty to one hundred persons who had collected together. After the evidence was all in, the defendants asked the judge to instruct the jury as follows: —

"If the jury are satisfied that whatever acts and things the defendants did to each other they did by mutual consent, and that the struggle between them was an amicable contest voluntarily continued on both sides without anger or malice, and simply for the purpose of testing their relative agility and strength, then there is no assault and battery, and the defendants must be acquitted."

The judge declined to give this instruction, but instructed the jury upon this branch of the case in substance as follows: "That if the defendants were simply engaged in a wrestling match, that being a lawful sport, they could not be convicted of an assault and battery; but if by mutual agreement between themselves, previously made, they went to a retired spot for the purpose of fighting with each other and for the purpose of doing each other physical injury by fighting, with a view to ascertain by a trial of their skill in fighting which was the best man, and there engaged in a fight, each endeavoring to do and actually doing all the physical injury in his power to the other, and if, in such contest, each did strike the other with his fist for the purpose of injuring him, each may properly be convicted of assault and battery upon the other, although the whole was done by mutual arrangement, agreement, and consent, and without anger on the part of either against the other."

To this instruction, and to the refusal of the judge to give the instruction prayed for, the defendants alleged exceptions.

G. S. Scammon, for the defendants.

W. C. Loring (*C. R. Train*, Attorney-General, with him), for the Commonwealth.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a "run and catch" wrestling match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill, and activity, and "to fit people for defence, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. Fost. C. L. 259, 260; Com. Dig. Plead. 3 m. 18. But prize-fighting, boxing-matches, and encounters of that kind serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill-will. Fost. C. L. 260; 2 Greenl. on Ev. § 85; 1 Stephens N. P. 211.

If one party license another to beat him, such license is void, because it is against the law. Matthew *v.* Ollerton, Comb. 218. In an action for assault the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. Boulter *v.* Clark, Bull. N. P. 16. The same rule was laid down in Stout *v.* Wren, 1 Hawks (N. C.), 420, and in Bell *v.* Hansley, 3 Jones (N. C.), 131. In Adams *v.* Waggoner, 33 Ind. 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought with each other by mutual consent, but that such consent may be shown in mitigation of damages. See Logan *v.* Austin, 1 Stew. (Ala.) 476. It was said by Coleridge, J., in Regina *v.* Lewis, 1 C. & K. 419, that "no one is justified in striking another except it be in self-defence, and it ought to be known that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it was immaterial who strikes the first blow. See Rex *v.* Perkins, 4 C. & P. 537.

Two cases only have been called to our attention where a different rule has been declared. In Champer *v.* State, 14 Ohio St. 437, it was held that an indictment against A. for an assault and battery on B. was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight of authority. In State *v.* Beck, 1 Hill (S. C.), 363, the opinion contains statements of law in which we cannot concur.

Exceptions overruled.

SECTION IV.

Fault of the Injured Party.

(*d*) CONTRIBUTORY CRIME.

REX *v.* STRATTON.

NISI PRIUS. 1809.

[*Reported* 1 *Campbell*, 549]

INDICTMENT for a conspiracy to deprive one Thompson of the office of secretary to the Philanthropic Annuity Society, and to prosecute him, without any reasonable or probable cause, for obtaining money upon false pretences. It appeared that this society is an unincorporated company, with transferable shares; that there was a violent dispute among the subscribers as to the choice of secretary; that one party, headed by the defendants, cashiered the prosecutor; that he still went on collecting subscriptions, and that they indicted him for obtaining money upon false pretences, of which he was acquitted.

Lord Ellenborough. This society was certainly illegal. Therefore, to deprive an individual of an office in it, cannot be treated as an injury. When the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. In Dodd's case, all the judges of this court were agreed upon the illegality of these associations; and I understand there has since been a nonsuit in the Common Pleas upon the same ground. Nor can I say that the prosecutor was indicted without reasonable or probable cause. I thought he was not guilty of the offence imputed to him; because it did not appear that he acted with a fraudulent purpose. But he did obtain the money upon a false pretence. He pretended that there was then a real, legal society, to which he was secretary; whereas no such society existed. The defendants must all be acquitted.[1]

REGINA v. ———.

Central Criminal Court. 1845.

[*Reported* 1 *Cox C. C.* 250.]

The defendant was indicted for uttering counterfeit coin. Evidence was adduced to show that he had given a counterfeit sovereign to a girl with whom he had had intercourse.

Bodkin, in opening the case for the prosecution, referred to R. *v.* Page, 8 C. & P. 122, in which Lord Abinger ruled that the giving a piece of counterfeit money away in charity was not an uttering within the 2 Wm. IV. c. 34, § 7, although the person giving knew it to be counterfeit, as there must be some intention to defraud. The learned counsel contended that the present case was clearly distinguishable, even supposing that to be the law, and he apprehended that the question for the jury would be, whether the coin had been passed with a knowledge of its being counterfeit and with the intention of putting it into circulation.

Lord Denman, C. J. (in summing up). As to the law of this case, my learned brother (Coltman, J.) and myself are clearly of opinion that if the defendant gave the coin to the woman under the circumstances stated, knowing it to be counterfeit, he is guilty of the offence charged. We do not consider the decision of Lord Abinger to be in point; that was a case of charity; at the same time we have great doubts as to the correctness of that ruling, and if a similar case were to arise we should reserve the point.[1]

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[1] See Rex *v.* Beacall, 1 C. & P. 454; Reg. *v.* Hunt, 8 C. & P. 642; Com. *v.* Smith, 129 Mass. 104. — Ed.

REGINA *v.* HUDSON.

CROWN CASE RESERVED. 1860.

[*Reported* 8 *Cox C. C.* 305]

CASE reserved for the opinion of this court, by J. B. Maule, Esq., barrister-at-law, sitting as Deputy for the Recorder of York.

At the Epiphany Sessions, 1860, held for the city of York, the prisoners were jointly indicted and tried before me upon an indictment, the two first counts of which charged them with an offence under the 8 & 9 Vict. c. 109.

Third count. The prisoners were charged with a conspiracy to cheat in the following form: —

"That they unlawfully and fraudulently did combine, confederate, and conspire together with divers other persons to the jurors unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from the said A. Rhodes the sum of £2 10*s.* of the money of the said A. Rhodes, and unlawfully to cheat and defraud the said A. Rhodes of the same, against the peace, etc."[2]

The evidence disclosed that the three prisoners were in a public house together with the prosecutor, Abraham Rhodes, and that in concert with the other two prisoners, the prisoner John Dewhirst placed a pen-case on the table in the room where they were assembled and left the room to get writing-paper. Whilst he was absent the other two prisoners, Samuel Hudson and John Smith, were the only persons left drinking with the prosecutor; and Hudson then took up the pen-case and took out the pen from it, placing a pin in the place of it, and put the pen that he had taken out under the bottom of the prosecutor's drinking-glass; and Hudson then proposed to the prosecutor to bet the prisoner Dewhirst when he returned that there was no pen in the pen-case. The prosecutor was induced by Hudson and Smith to stake 50*s.* in a bet with Dewhirst upon his returning into the room, that there was no pen in the pen-case; which money the prosecutor placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into the prosecutor's hand, and another pen with the pin fell into his hand, and then the prisoners took his money.

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[1] *Acc.* Com. *v.* Woodbury, Thach. (Mass.) 47.

[2] *Contra*, People *v.* Wilson, 6 Johns. 320. — ED.

Upon this evidence it was objected, on behalf of the prisoners, that no offence within the meaning of the 8 & 9 Vict. c. 109, was proved by it, and that the facts proved in evidence did not amount to the offence charged in the third count.

I thought the objection well founded as to the offence under the 8 & 9 Vict. c. 109, but held that the facts in evidence amounted to the offence charged in the third count, and directed the jury to return a separate verdict on each count, a case having been asked for by the prisoners' counsel, for the consideration of the Court for Crown Cases Reserved.

The jury returned a verdict of guilty on each of the three counts.

The prisoners were sentenced to eight months' imprisonment, and committed to prison for want of sufficient sureties.

If the court for the consideration of Crown Cases Reserved shall be of opinion that the above facts in evidence constituted in law any one of the offences charged in the indictment, and was evidence to go to the jury in support thereof, the verdict is to stand for such of the counts in which the offence is laid to which the evidence applies.

Price, for the prisoners. As to the third count, to sustain that the evidence should have shown such a false pretence as *per se* would constitute the ordinary misdemeanor of false pretences.

Pollock, C. B. Why so? This is a count for conspiracy to cheat.

Price. Yes, by false pretences.

Channell, B. If the count had said merely to conspire, and had omitted the words "by false pretences," it would have been good.

Blackburn, J. Here the prisoners cheated the prosecutor into the belief that he was going to cheat, when in fact he was to be cheated.

Price. This is a mere private deceit, not concerning the public, which the criminal law does not regard, but is a deceit against which common prudence might be guarded. There is no evidence of any indictable combination to cheat and defraud.

Channell, B. If two persons conspire to puff up the qualities of a horse and thereby secure an exorbitant price for it, that is a criminal offence.

Price. That affects the public. At the trial the present case was likened to that of Rex *v.* Barnard, 7 C. & P. 784, where a person at Oxford, who was not a member of the university, went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case, however, was nothing more than a bet on a question of fact, which the prosecutor might have satisfied himself of by looking at the pencil-case. It is more like an ordinary conjuring-trick. Besides, here the prosecutor himself intended to cheat one of the prisoners by the bet.

No counsel appeared for the prosecution.

Pollock, C. B. We are all of opinion that the conviction on the third count is good and ought to be supported. The count is in the usual form, and it is not necessary that the words "false pretences" stated in it should be understood in the technical sense contended for by Mr. Price. There is abundant evidence of a conspiracy by the prisoners to cheat the prosecutor, and though one of the ingredients in the case is that the prosecutor himself intended to cheat one of the prisoners, that does not prevent the prisoners from liability to be prosecuted upon this indictment. *Conviction affirmed.*

COMMONWEALTH *v.* MORRILL.

Supreme Judicial Court of Massachusetts. 1851.

[*Reported* 8 *Cushing*, 571.]

This was an indictment which alleged that the defendants, Samuel G. Morrill and John M. Hodgdon, on the 17th of September, 1850, at Newburyport, "devising and intending one James Lynch by false pretences to cheat and defraud of his goods, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said Lynch that a certain watch which said Morrill then and there had, and which said Morrill and Hodgdon then and there proposed and offered to exchange with said Lynch for two other watches belonging to said Lynch, was a gold watch of eighteen carats fine and was of great value, to wit, of the value of eighty dollars; and the said Lynch, then and there believing the said false pretences and representations so made as aforesaid by said Morrill and Hodgdon, and being deceived thereby, was induced by reason of the false pretences and representations so made as aforesaid to deliver, and did then and there deliver, to the said Morrill the two watches aforesaid, belonging to said Lynch, and of the value of twenty dollars, and the said Morrill and Hodgdon did then and there receive and obtain the two said watches, the property of said Lynch, as aforesaid, in exchange for the said watch, so represented as a gold watch as aforesaid, by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said Lynch of his said two watches, as aforesaid; whereas in truth and in fact said watch so represented by said Morrill and Hodgdon as a gold watch, eighteen carats fine, and of the value of eighty dollars, was not then and there a gold watch, and was not then and there eighteen carats fine, and was then and there of trifling value," etc.

At the trial in the Court of Common Pleas, before Hoar, J., it appeared in evidence that Lynch represented his watches, one of which was of silver and the other of yellow metal, as worth fifty dollars; and on the testimony of the only witness for the Commonwealth who was a judge of the value of watches, they were worth not exceeding fifteen dollars. Lynch testified that his silver watch cost him fifteen dollars; that he received the other in exchange for two, which cost him respectively seven dollars and thirteen dollars; and that he believed it to be worth thirty dollars.

The defendant requested the presiding judge to instruct the jury that if Lynch's watches were not worth fifty dollars, or some considerable part of that sum, but were of merely trifling value, this indictment could not be maintained. But the judge instructed the jury that if they supposed that each of the parties was endeavoring to defraud the other, and Lynch knew that his watches were of little value, the jury should not convict the defendants merely because they had the best of the bargain; but that if the defendants made the false representations charged in the indictment, with the intent to defraud, knowing them to be false, and they were such as would mislead and deceive a man of ordinary prudence, and Lynch, by reason of the representations, and trusting in them, parted with his property and was defrauded, it was not necessary to show that he was defrauded to the extent charged in the indictment, provided he in good faith parted with property which he believed to be valuable, and was defrauded to any substantial amount, for example, to the amount of five dollars; and that the defendants might be convicted, although, from the mistake of Lynch in over-estimating his property, he might not have been cheated to so great an extent as he at the time supposed.

The jury found the defendants guilty, who thereupon moved in arrest of judgment, on the ground that the indictment was insufficient; and this motion being overruled, they alleged exceptions to the order of the court, overruling the same, and also to the instructions aforesaid.

W. C. Endicott, for the defendant.

Clifford, Attorney-General, for the Commonwealth.

DEWEY, J.[1] The exceptions taken to the instructions of the presiding judge cannot be sustained. If it were true that the party from whom the defendants obtained goods by false pretences also made false pretences as to his goods which he exchanged with the defendants, that would be no justification for the defendants, when put on trial upon an indictment charging them with obtaining goods by false pretences, knowingly and designedly in violation of a statute of this Commonwealth. Whether the alleged misrepresentation of Lynch, being a mere representation as to the value or worth of a certain watch and an opinion rather than a statement of a fact, would be such false pretence as would render him amenable to punishment under this statute, might be questionable, but supposing that to be otherwise, and it should appear that Lynch had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offence, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.[1]

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[1] Part of the opinion, referring to a question of pleading, is omitted.

McCORD *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1871.

[*Reported* 46 *New York*, 470.]

ERROR to the General Term of the Supreme Court in the first department to review judgment, affirming judgment of the Court of General Sessions in and for the County of New York, convicting the plaintiff in error upon an indictment for false pretences.

The plaintiff in error, Henry McCord, was tried and convicted in the Court of General Sessions of the Peace, in and for the County of New York, at the June term, 1870, upon an indictment charging in substance that with intent to cheat and defraud one Charles C. Miller, he falsely and fraudulently represented, —

"That he, the said Henry McCord, was an officer attached to the bureau of Captain John Young's department of detectives, and that he had a warrant issued by Justice Hogan, one of the police justices of the city of New York, at the complaint of one Henry Brinker, charging the said Charles C. Miller with a criminal offence and for his arrest; and that the said Henry Brinker had promised him, the said Henry McCord, $200 for the arrest of him, the said Charles C. Miller."

And that said Miller, believing such false representations, was induced to and did deliver to McCord a gold watch and a diamond ring.[2]

PER CURIAM. If the prosecutor parted with his property upon the representations set forth in the indictment, it must have been for some unlawful purpose, a purpose not warranted by law. There was no legitimate purpose to be attained by delivering the goods to the accused upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given is not disclosed. But whatever it was, it was necessarily inconsistent with his duties as an officer having a criminal warrant for the arrest of the prosecutor, which was the character he assumed. The false representation of the accused was that he was an officer and had a criminal warrant for the prosecutor. There was no pretence of any agency for or connection with any person or of any authority to do any act save such as his duty as such pretended officer demanded.

The prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offence. Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who, for some honest purpose, are induced upon false and fraudulent representations to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods. People *v.* Williams, 4 Hill, 9; Same *v.* Stetson, 4 Barb. 151.

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[1] *Acc.* Peo. *v.* Martin (Cal.), 36 Pac. 952; *In re* Cummins, 16 Col. 451, 27 Pac. 887. And see Com. *v.* Henry, 22 Pa. 253. — ED.

[2] Arguments of counsel and the dissenting opinion of PECKHAM, J., are omitted.

The judgment of the Supreme Court and of the Sessions must be reversed and judgment for the defendant.[1]

STATE *v.* PATTERSON.

SUPREME COURT OF KANSAS. 1903.

[*Reported* 66 *Kan.* 447.]

BURCH, J.[2] The appellant was convicted of embezzlement of money which came into his hands by virtue of his official position as treasurer of the city of Clyde. . . .

The defence to the action was that appellant collected the money embezzled from persons engaged in unlawful traffic in intoxicating liquors in the city of Clyde, under an arrangement between such persons and the city whereby immunity from prosecution was secured to them. Counsel for appellant call this money "blood-money"; characterize its collection as "robbery," and, from their language, would seem to regard the transaction at least as infamous as that of the thief "in the sacristy with the fair adornments," whom Dante located as far down as the eighth circle of hell. And because of the utter indefensibility of the conduct of the city and of the appellant under the law, it is claimed he cannot be punished criminally. The defence is applied in many ways. It is said the city could not authorize the collection of such money; that appellant could not act for the city in such business; that he did not act as city treasurer, or by virtue of such office, and could exercise no official conduct in such an affair; that money received by him from such source could not, and did not, become the property of the city; and that, if it did become the city's money, it was so unclean that the law of embezzlement will not take cognizance of it. The district court excluded all evidence relating to this defence. In this it was correct. The defence is repugnant to law, to morality, and even to expediency in the regulation of the conduct of individuals in society.

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[1] *Acc.* State *v.* Crowley, 41 Wis. 271. But see Peo. *v.* Tompkins, (N. Y.), 79 N. E. 326. — ED.

[2] Part of the opinion is omitted. — ED.

In 1852 the Supreme Court of Massachusetts, in deciding that money accumulated by the illegal sale of intoxicating liquors was nevertheless the subject of larceny, said:

"That same common law, which, in its integrity and wisdom, refuses to lend itself to be the instrument, even indirectly, for the execution of a criminal contract, will as little condescend to throw its mantle over crime itself. The law punishes larceny, because it is larceny; and, therefore, one may be convicted of theft, though he do but steal his own property, from himself or his bailee. 7 H. VI. 43*a*; 3 Co. Inst. 110. And the law punishes the larceny of property, not solely because of any rights of the proprietor, but also because of its own inherent legal rights as property; and, therefore, even he, who larceniously takes the stolen object from a thief whose hands have but just closed upon it, may himself be convicted therefor, in spite of the criminality of the possession of his immediate predecessor in crime. This principle is coeval with the common law itself as a collection of received opinions and rules, for we have to go back to the Year-books to find its first judicial announcement. The leading decision is the case of a so-called John at Stile, in 13 Edw. IV, 3*b*, where it was held by the judges that if A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is indictable both as to A. and as to B. This decision was afterwards affirmed *arguendo* in 4 Hen. VII 5*b*.

"We do not say our doctrine is good law, merely because it was in principle so adjudged in the time of the Plantagenets and the Tudors; but we say it is good law, also, because it is reasonable and just; because every subsequent authority in England, such as Hale, 1 Hale, P. C. (Am. ed.) 507; East. 2 East, P. C. 654; Russell, 2 Russ. on Crim. (6th Am. ed.) 89, has adopted and approved it; because it has been affirmed by modern judicial opinion in England; Wilkin's Case, 2 Leach, 586; because it has already been recognized in the United States; Ward *v.* The People, 3 Hill, 396; and because it thus bears that genuine stamp of venerable time, which consists, not in the antiquity of date — for there may be old errors as well as new ones — but in having stood the test of the scrutiny of many successive ages. . . .

"If, looking beyond the mere question of property, we pass to considerations of public policy, this may be regarded in two points of view, one, of convenience in the administration of justice, the other, of higher ethical relation. As to the former point, it is not easy to conceive anything which would more seriously embarrass the public ministers of justice, and obstruct its administration, than if it were held that any element of illegality in the acquisition of property rendered it incapable of being the subject of larceny, and if, as a consequence, the necessity followed, in every case, to go into the inquiry how the party complaining acquired the property.

"As to the latter point, if the question be put in the form most favorable to the argument for the defendant here, it stands thus: of the alternative moral and social evils, which is the greater — to deprive property unlawfully acquired of all protection as such, and thus to discourage unlawful acquisition but encourage larceny; or to punish, and so discourage larceny, though at the possible risk of thus omitting so far forth to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished. Each violation of law is to be dealt with by itself. The felonious taking has its appropriate and specific punishment; so also has the unlawful acquisition." (Commonwealth *v.* Rourke, 10 Cush. 397.)

Such is the law both of larceny and embezzlement in the United States. (State *v.* Cloutman, 61 N. H. 143; Commonwealth *v.* Smith, 129 Mass. 104; Commonwealth *v.* Cooper, 130 id. 285; Woodward *v.* The State, 103 Ind. 127, 2 N. E. 321; Stave *v.* O'Brien, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252; People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736; The State *v.* Shadd, 80 Mo. 358; Miller & Smith *v.* The Commonwealth, 78 Ky. 15, 39 Am. Rep. 194; The State of Iowa *v.* May, 20 Iowa, 305; Bales *v.* The State, 3 W. Va. 685; State *v.* Littschke, 27 Ore. 189, 40 Pac. 167; Hertzler *v.* Geigley, 196 Pa. St. 419, 46 Atl. 366, 79 Am. St. Rep. 724.)

Crime does indeed beget crime, but such progeny cannot justify itself before the law by its hideous and hateful parentage.

The judgment of the district court is therefore affirmed. All the Justices concurring.

SECTION V.

Negligence of the Injured Party.

REGINA *v.* HOLLAND.

LIVERPOOL ASSIZES. 1841.

[*Reported* 2 *Moody & Robinson*, 351.]

INDICTMENT for murder. The prisoner was charged with inflicting divers mortal blows and wounds upon one Thomas Garland, and (among others) a cut upon one of his fingers.

It appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, among other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated. It was thereupon dressed by the surgeon, and the deceased attended at the infirmary from day to day to have his wounds dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon deposed that if the finger had been amputated in the first instance, he thought it most probable that the life of the deceased would have been preserved.

For the prisoner, it was contended that the cause of death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would, according to the evidence, have been prevented.

MAULE, J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question is whether in the end the wound inflicted by the prisoner was the cause of death. *Guilty.*[1]

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[1] *Acc.* Com. *v.* Hackett, 2 All. 136. — ED.

REGINA *v.* KEW.

SUFFOLK ASSIZES. 1872.

[*Reported* 12 *Cox C. C.* 355.]

THE prisoners were indicted for manslaughter. It appeared that on the 2d of June the prisoner, Jackson, who was in the employ of Mr. Harris, a farmer, was instructed to take his master's horse and cart and drive the prisoner Kew to the Bungay railway station. Being late for the train, Jackson was driving at a furious rate, at full gallop, and ran over a child going to school and killed it. It was about two o'clock in the afternoon, and there were four or five little children from five to seven years of age going to school unattended by any adult.

Metcalfe and *Simms Reeve*, for the prisoners, contended that there was contributory negligence on behalf of the child running on the road, and that Kew was not liable for the acts of another man's servant, he having no control over the horse and not having selected either the horse or the driver.

BYLES, J., after reading the evidence, said: Here the mother lets her child go out in the care of another child only seven years of age, and the prisoner Kew is in the vehicle of another man, driven by another man's servant, so not only was Jackson not his servant but he did not even select him. It has been contended if there was contributory negligence on the children's part, then the defendants are not liable. No doubt contributory negligence would be an answer to a civil action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence, even if they had been adults. If they were of opinion that the prisoners were driving at a dangerous pace in a culpably negligent manner, then they are guilty. It was true that Kew was not actually driving, but still a word from him might have prevented the accident. If necessary he would reserve the question of contributory negligence as a defence for the Court of Criminal Appeal.

The jury acquitted both prisoners.[1]

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[1] *Acc.* Reg. *v.* Longbottom, 3 Cox C. C. 439; Belk *v.* People, 125 Ill. 584; Crum *v.* State, 64 Miss. 1, 1 So. 1. But see Reg. *v.* Birchall, 4 F. & F. 1087. — ED.

SECTION VI.

Condonation.

4 Bl. Com. 133. *Theft bote* is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called compounding of felony; and formerly was held to make a man an accessory; but it is now punished only with fine and imprisonment. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law "*latroni eum similem habuit, qui fertum celare vellet, et occulte sine judice compositionem ejus admittere.*" By statute 25 Geo. II. c. 36, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of £50 each.[1] 1 Hawk. P. C. ch. 7, sect. 7. But the bare taking of one's own goods again which have been stolen is no offence at all unless some favor be shown to the thief.

COMMONWEALTH *v.* SLATTERY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888.

[*Reported* 147 *Mass.* 423.]

INDICTMENT for rape on Bridget Donovan.[2] At the trial in the Superior Court, before *Dunbar, J.*, the defendant asked the judge to instruct the jury "that, if said Donovan at any time after the act excused or forgave the defendant, then she ratified the act, and he cannot be convicted in the case." The judge refused so to instruct, but instructed the jury that evidence of her acts and conversation with the defendant, both before and after the commission of the alleged offence, was a proper subject for their consideration in determining the guilt or innocence of the defendant at the time of its commission. The defendant alleged exceptions.

W. ALLEN, J. The court rightly refused to give the instructions requested. The injured party could not condone the crime by excusing or forgiving the criminal.

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[1] See Reg. *v.* Burgess, 15 Cox C. C. 779.

[2] Only so much of the case as involves the question of condonation is printed.

FLEENER *v.* STATE.

SUPREME COURT OF ARKANSAS. 1893.

[*Reported* 58 *Ark.* 98.]

BUNN, C. J.[1] The defendant, A. W. Fleener, was indicted at the October term, 1892, of the St. Francis circuit court, for the crime of embezzlement; at the March term, 1893, found guilty and sentenced to imprisonment in the penitentiary for the period of one year. Motions in arrest of judgment and also for a new trial were overruled, and appeal taken to this court.

The fourth ground of the motion for a new trial is a novel one. The defendant contends that, having hired the guarantee company to make his bond for faithful performance of duty to the Pacific Express Company, and that company having paid the express company for all losses claimed by it to have been suffered by reason of defendant's alleged embezzlement, therefore there was no crime committed; that the express company had no longer any interest at stake, and even that the State has no interest in the matter. In this the defendant is mistaken. This is no longer a controversy between himself and the two companies, or either of them, and has not been since he fraudulently appropriated the money of the express company, if indeed he did so appropriate it. It is now a controversy between the State of Arkansas and himself, which the State will not permit either one of the said companies to determine at present or in the future, nor will the State acknowledge the validity of any settlement of it, by any thing they both, or either of them, have done in the past.

COMMONWEALTH *v.* KENNEDY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[*Reported* 160 *Mass.* 312.]

COMPLAINT, charging the defendant with violating the provisions of Pub. Sts. c. 69, § 5, by boarding a ship without obtaining leave, as therein required.

At the trial in the Superior Court, before BOND, J., there was evidence tending to show that the ship was unable to obtain a place at a wharf as desired, and was obliged to anchor in the harbor, that the captain was on board and in charge of the vessel, that the defendant was not a pilot or public officer, and that he had no written leave from any owner or agent of the vessel to go on board.

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[1] Part of the opinion is omitted. — ED.

While the vessel was at anchor in the harbor, the defendant went on board, and, before doing any business, approached the captain and obtained permission from him to remain on board. The defendant contended, and asked the judge to rule, that, if the defendant boarded the vessel intending, before he engaged in any business on board, to obtain leave of the captain to remain, and he did obtain such leave before he engaged in any business on board, he was not guilty of any violation of the statute.

The judge declined so to rule, and instructed the jury that the statute required a person to obtain leave of the master or person in charge of the vessel before going on board, and that it would be a violation of the statute if the defendant boarded the vessel before it was made fast to the wharf without first obtaining leave of the master or person in charge.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

MORTON, J. We think that the statute in question must be construed as if it read "without first having obtained leave from the master or person having charge of such vessel, or without first having obtained leave in writing from its owners or agents." Pub. Sts. c. 69, § 5. The statute as originally enacted was intended according to its title "to protect mariners and shipowners from imposition" (St. 1857, c. 139), and in order to do that forbade without qualification the entry upon a vessel before it was made fast to the wharf of any person except a pilot or public officer, without having obtained leave from one of the persons named in the statute. The original statute was re-enacted, with slight changes in phraseology, in Gen. Sts. c. 52, §§ 22 to 29 inclusive, excepting § 26, which was a re-enactment of St. 1859, c. 235, and the provisions of the General Statutes were incorporated into Pub. Sts. c. 69, §§ 5 to 12 inclusive, excepting § 7, which was a re-enactment of St. 1874, c. 76. The offence with which the defendant is charged became complete upon his boarding the vessel without having obtained the leave which the statute required, no matter what his motive was, and without regard to the fact that permission was afterwards given him by the captain to remain on board. Commonwealth *v.* Slattery, 147 Mass. 423; Commonwealth *v.* Tobin, 108 Mass. 426. Cases may be supposed where the application of this rule would operate with harshness, but they do not justify us in departing from the words of the statute. *Exceptions overruled.*

COMMONWEALTH *v.* St. JOHN.

Supreme Judicial Court of Massachusetts. 1899.

[*Reported* 173 *Mass.* 566.]

Indictment, against Joseph St. John, Albert St. Germaine, and Eugene Bernatchez, charging the first named defendant, on May 31, 1896, at Springfield, with unlawfully using a certain instrument in and upon the body of a woman named, with intent to procure a miscarriage, and thereby causing her death; and charging the other defendants with being accessories before the fact.

St. Germaine, in support of his plea in bar, offered to show that he was promised and pledged by the city marshal of Springfield, who was at the time at the head of the police department of the city, and by one Boyle, the chief detective of the police department, and who were in the preliminary proceedings the prosecuting officers, and by whom a warrant was obtained for the arrest of St. Germaine, that if he would make full disclosure and confession of what he knew with reference to the abortion alleged to have been performed by St. John, and against whom a complaint had been made and a warrant issued from the police court of Springfield for such offence, as principal, and if St. Germaine would hold himself in readiness to testify and would testify at the preliminary hearing in the police court upon the complaint and warrant against St. John, and if he would hold himself in readiness to testify at any other trial or hearing with reference to the charge against St. John, he should have immunity and protection from the crime charged against him in the indictment.

The judge ruled that the evidence offered was not competent, and excluded the same; and each of the defendants alleged exceptions.[1]

Morton, J. The decisive question in each case is the same, and the cases may therefore properly be considered together. The question is whether the immunity that was promised to the defendants by the city marshal and by Boyle, the chief detective of the police department of Springfield, can be pleaded in bar of the indictment against them. We think that it cannot. The immunity and protection which may be promised from the consequences of crime on condition of a full disclosure and readiness to testify are not a matter of right, but rest in the last resort on the sound judicial discretion of the court having final jurisdiction to sentence, and cannot therefore be pleaded in bar. Wright *v.* Rindskopf, 43 Wis. 344; State *v.* Moody, 69 N. C. 529; State *v.* Graham, 12 Vroom, 15; Rex *v.* Rudd, Cowp. 331; Whart. Crim. Ev. §§ 439. 443; 3 Russ. Crimes (9th Am. ed.), 599.

When such promises are made by the public prosecutor or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept. The prosecuting officer has also the power to enter a *nolle prosequi*. It appears in each case that neither the city marshal nor Boyle had any authority from the District Attorney to make the promises or hold out the inducements which they did. There is nothing in either bill of exceptions tending to show that the District Attorney had anything to do with the prosecution in the police court. Neither of the defendants appeared before the grand jury, although they were at the court-house from day to day when the grand jury was in session, ready to testify, relying on the promises of immunity made by the city marshal and by Boyle. And there is nothing tending to show that there was any expectation or understanding on the part of the District Attorney that either was to testify as a government witness in the Superior Court, and neither did so testify. If an appeal had been made to the clemency of the court, it would no doubt have been competent for the court to take into consideration the inducements which had been held out and the promises that had been made, if any, by the city marshal and by Boyle. But what was done was to plead the promises and inducements in bar. A question of law was thus presented, and we think that the ruling of the court was clearly right. *Exceptions overruled.*

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[1] The statement of facts has been shortened. — Ed.

In re LEWIS.

SUPREME COURT OF KANSAS. 1903.

[*Reported* 67 *Kan.* 562.]

MASON, J.[1] Oscar Lewis was arrested on a warrant issued April 2, 1903, charging him with having, on June 1, 1902, obtained illicit connection, under promise of marriage, with Nellie Meador, she being of good repute and under twenty-one years of age. Upon a preliminary examination he was held to answer the charge. It was shown that on November 27, 1902, he was married to said Nellie Meador, and he now asks his discharge upon *habeas corpus* on the ground that such marriage is a complete bar to the prosecution. The state claims, and the claim is supported by the evidence, that the defendant abandoned his wife on the morning after the marriage, but this does not affect the legal aspect of the matter.

In the following cases it has been held that a subsequent marriage is a bar to a prosecution for seduction: Commonwealth *v.* Eichar, 4 Pa. L. J. Rep. 326; People *v.* Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; The State *v.* Otis, 135 Ind. 267, 24 N. E. 954, 21 L. R. A. 733. The law is so stated in Wharton on Criminal Law, 10th edition, volume 2, page 1760, and Lawson's Criminal Defences, volume 5, page 780. These statements of the text-writers, however, are based solely upon the cases just cited, and therefore add ittle to their authority. The Michigan and Indiana cases, moreover, merely followed the reasoning in Commonwealth *v.* Eichar, *supra*, so that the soundness of the doctrine in principle can be determined from an examination of the opinion in that case. Its full text upon this point is as follows:

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[1] Part of the opinion is omitted. — ED.

"The evidence fully establishes the fact that, six months previous to the finding of this indictment by the grand jury, the defendant was legally married by the Rev. Mr. Rugan, of the Lutheran church, to the female whom he is charged with having seduced. She is by the laws of God and man his wife, and as such is entitled to all the rights which are incident to that relation. Can he now be convicted and punished for her seduction before marriage? It is not the carnal connection, even when induced by the solicitation of a man, that is the object of this statutory penalty, but it is the seduction under promise of marriage which is an offence of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Clearly not, but a false promise, broken and violated after performing its fiendish purpose. The evil which led to the enactment was not that females were seduced and then made the wives of the seducer, but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent."

Our attention has not been called to any actual adjudication against this doctrine, nor have we discovered any. However, in State *v.* Bierce, 27 Conn. 319, 324, in considering the question whether it could be shown in defence that the promise of marriage was made in good faith, and broken only by reason of the subsequent misconduct of the complaining witness, the court said:

"Even if he had performed his promise to marry her, we do not perceive how it could plausibly be urged that it would be any answer to the charge of the previous seduction; however, such partial reparation might be viewed as a circumstance to mitigate the punishment. As to the claim founded on the misconduct of the female subsequent to the illicit connection between her and the defendant, it is a sufficient answer that the offence was committed and complete before such misconduct took place, and that, whatever effect it might have upon a claim by her upon him for the breach of his promise of marriage, or however it might be considered by the court in affixing the punishment for the offence charged upon the defendant, it could not relate back to render legal or innocent a violation of the statute for which he had already become amenable."

In State *v.* Wise, 32 Ore. 280, 282, 50 Pac. 800, it was said:

"But, as we take it, the gravamen of the offence is the act of seducing and debauching an unmarried female, of previous chaste character, under or by means of a promise of marriage; and the crime is complete as soon as the act is accomplished, although a subsequent marriage is by statute a bar to a prosecution."

In People *v.* Hough, 120 Cal. 558, 52 Pac. 846, 65 Am. St. Rep. 201, the court held:

"When a man induces an unmarried female of previous chaste character to submit her person to him by reason of a promise of marriage upon his part, the seduction has taken place — the crime has been committed. The succeeding section, which provides that the marriage is a bar to a prosecution, clearly recognizes that the crime has been committed when the promise has been made and the intercourse thereunder has taken place. There may be incidental references in some cases indicating that a refusal upon the part of the man to carry out the promise is a necessary element of the offence. (People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; State *v.* Adams, 25 Ore. 172, 35 Pac. 36, 22, L. R. A. 840, 42 Am. St. Rep. 790.) But such is not the fact."

In Clark and Marshall's Law of Crimes, page 1122, the authors say:

"By express provision of the statutes in most states, the subsequent intermarriage of the parties is a bar to a prosecution for seduction. But this is not the case in the absence of such a provision, for, as was shown in another place, the person injured by a crime cannot prevent a prosecution by afterwards condoning the offence."

Notwithstanding the authorities cited in support of the contention of defendant, we are not disposed to yield assent to it. Being based upon the Pennsylvania case, they depend for their force, as it does, upon the soundness of the reasoning by which it is supported, and this reasoning is based less upon the language of the statute than upon considerations of public policy, and the decision borders upon judicial legislation.

While the following language of Mr. Justice Johnston in The State *v.* Newcomer, 59 Kan. 668, 54 Pac. 685, was used in a case of statutory rape, it is equally applicable here, and is a satisfactory refutation of every argument advanced in the opinion in the Eichar case:

"In behalf of the defendant it is argued that the evil consequences of the unlawful act have been averted by the marriage; that when the parties to the act voluntarily, and in good faith, entered into the marriage relation the offence was condoned, and that the welfare of the parties and their offspring requires and the interest of the public will be best subserved by the ending of the prosecution.

"The difficulty with this contention is that the law does not provide that the offence may be expiated by marriage or condoned by the injured female. Her consent to the sexual act constitutes no defence, and neither her forgiveness nor anything which either or both will do will take away the criminal quality of the act or relieve the defendant from the consequences of the same. The principle of condonation which obtains in divorce cases where civil rights are involved has no application in prosecutions brought at the instance of the state for the protection of the public and to punish a violation of the law. It is true, as stated, that society approves the act of the defendant, when he endeavors to make amends for the wrong done the injured female, by marrying her, and usually a good-faith marriage between the parties to the wrong prevents or terminates a prosecution; but the statute which defines the offence and declares punishment therefor makes no such provision. If the defendant has acted in good faith in marrying the girl, and honestly desires to perform the marital obligation resting upon him, and is prevented from doing so by the influence and interference of persons other than his wife, it may constitute a strong appeal to the prosecution to discontinue the same, or to the governor for the exercise of executive clemency, but as the law stands it furnishes no defence to the charge brought against the defendant."

Moreover, the doctrine of the Pennsylvania, Michigan and Indiana courts, if accepted as sound, would not necessarily control here, since it has arisen under statutes for the punishment of offences that include the element of seduction, properly so called, and the decisions supporting it are based to some extent upon that fact. The Kansas statute here involved (Gen. Stat. 1901, § 2021) does not use the word "seduce," and, while the offence it creates is commonly and conveniently called "seduction," this does not imply that the term is technically correct. It makes criminal the act of obtaining illicit connection under promise of marriage with any female of good reputation under twenty-one years of age. This does not constitute seduction, as the word is used in the statutes of other states.

We hold that a subsequent marriage to the injured female is not a bar to a prosecution under section 2021 of the General Statutes of 1901.

CHAPTER IV.

CULPABILITY.

SECTION I.

What Crimes Require a Guilty Mind.

REGINA *v.* TOLSON.

CROWN CASE RESERVED. 1889.

[*Reported* 23 *Queen's Bench Division*, 168.]

WILLS, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he reappeared.

The statute upon which the indictment was framed is the 24 & 25 Vict. c. 100, s. 57, which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years," with a proviso that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing an act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C. J., "that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime." Fowler *v.* Padget, 7 T. R. 509, 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute — fornication or seduction for instance — which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day, which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by Acts of Parliament which made the unauthorized possession of Government stores a crime, and the language used in by-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the by-law from building he shall be liable to a penalty. Yet in Reg. *v.* Sleep, L. & C. 44; 30 L. J. M. C. 170, it was held that a person in possession of Government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked, while the mere infringement of a building by-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so, shall pay a penalty, and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, while in the other case it has been held in Herne *v.* Garton, 2 E. & E. 66, that where the sender had made reasonable inquiry and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is no difference between the language by which it is enacted that "whosoever shall unlawfully and wilfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the daytime in pursuit of game" he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material: Taylor *v.* Newman, 4 B. & S. 89; in the second that it is immaterial: Watkins *v.* Major, L. R. 10 C. P. 662. So, again, there is no difference in language between the enactments I have referred to in which the absence of a guilty mind was held to be a defence, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of a misdemeanor, under which the contrary has been held: Reg. *v.* Bishop, 5 Q. B. D. 259. A statute provided that any clerk to justices who should, under color and pretence of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offence forfeit £20. It was held that where a clerk to justices *bona fide* and reasonably but erroneously believed that there were two sureties bound in a recognizance besides the principal, and accordingly took a fee as for three recognizances when he was only entitled to charge for two, no action would lie for the penalty. "*Actus*" says Lord Campbell, "*non facit reum, nisi mens sit rea.* Here the defendant very reasonably believing that there were two sureties bound, beside the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offence.' If, therefore, the table allowed him to charge for three recognizances where there are a principal and two sureties, he has not committed an offence under the act." Bowman *v.* Blyth, 7 E. & B. 26, 43.

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought aliunde, and that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and among such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account. In a case in which a woman was indicted under 9 & 10 Wm. III., c. 41, s. 2, for having in her possession without a certificate from the proper authority Government stores marked in the manner described in the Act, it was argued that by the Act the possession of the certificate was made the sole excuse, and that as she had no certificate she must be convicted. Foster, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration, otherwise a law calculated for wise purposes might be made a handmaid to oppression; and directed the jury that if they thought the defendant came into possession of the stores without any fraud or misbehavior on her part they ought to acquit her. Foster's Crown Law, 3d ed. App. pp. 439, 440. This ruling was adopted by Lord Kenyon in Rex *v.* Banks, 1 Esp. 144, who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind, instead of its being necessary for the crown to show the existence of the guilty mind. *Prima facie* the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked "Government Stores," and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In Fowler *v.* Padget, 7 T. R. 509, the question was whether it was an act of bankruptcy for a man to depart from his dwelling-house, whereby his creditors were defeated and delayed, although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was 1 Jac. I. c. 15, which makes it an act of bankruptcy (among other things) for a man to depart his dwelling-house "to the intent *or* whereby his creditors may be defeated and delayed." The court of King's Bench, consisting of Lord Kenyon, C. J., and Ashurst and Grose, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord Kenyon, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law that *actus non facit reum nisi mens sit rea;*" and the court went so far as to read "and" in the statute in place of "or," which is the word used in the Act, in order to avoid the consequences which appeared to them unjust and unreasonable. In Rex *v.* Banks, 1 Esp. 144, above cited, Lord Kenyon referred to Foster, J.'s, ruling in this case as that of "one of the best Crown lawyers that ever sat in Westminster Hall." These decisions of Foster, J., and Lord Kenyon have been repeatedly acted upon. See Reg. *v.* Willmett, 3 Cox C. C. 281; Reg. *v.* Cohen, 8 Cox C. C. 41; Reg. *v.* Sleep (in the Court for C. C. R.), L. & C. 44; 30 L. J. N. C. 170; Reg. *v.* O'Brien, 15 L. T. (N. S.) 419.

Now in the present instance one consequence of holding that the offence is complete if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had at the time of the second marriage every reason to believe the contrary, would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead who had married six years and eleven months after the last time she had known him to be alive would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had in the meantime distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon when dealing with a statute which literally interpreted led to what he considered an equally preposterous result: "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." Fowler *v.* Padget, 7 T. R. 509, 514.

Again, the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labor, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally, as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great; but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without necessity to multiply instances in which people shall be liable to conviction upon very grave charges, when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect of the offence now under discussion, that the proviso in 24 & 25 Vict. c. 100, s. 57, that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party, without any further inquiry, from criminal liability; and I think it is an argument of considerable weight in this connection, that under 9 & 10 Wm. III. c. 41, s. 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of Government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have treated it, to use the words of Lord Kenyon, as a matter that "could not bear a question," that the defendant might show in other ways that his possession was without fraud or misbehavior on his part. Rex *v.* Banks, 1 Esp. 144, 147.

Upon the point in question there are conflicting decisions.[1] There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the court of fifteen judges in Reg. *v.* Prince, L. R. 2 C. C. 154, is an authority in favor of a conviction in this case. I do not think so. In Reg. *v.* Prince the prisoner was indicted under 24 & 25 Vict. c. 100,

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[1] The learned judge here examined the following conflicting decisions: Reg. *v* Turner, 9 Cox C. C. 145; Reg. *v.* Horton, 11 Cox C. C. 670; Reg. *v.* Gibbons, 12 Cox C. C. 237; Reg. *v.* Bennett, 14 Cox C. C. 45; Reg. *v.* Moore, 13 Cox C. C. 544. — Ed.

s. 55, for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner *bona fide* believed upon reasonable grounds that she was eighteen. The court (dissentiente Brett, J.,) upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him, — he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind," as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father against his will was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*." [1]

The case of Reg. *v.* Prince, therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

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[1] "To my mind, it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it), to say that a person can be guilty of a crime in England without a wrongful intent, — without an attempt to do that which the law has forbidden. I am aware that in a particular case, and under a particular criminal statute, fifteen judges to one held that a person whom the jury found to have no intent to do what was forbidden, and whom the jury found to have been deceived, and to have understood the facts to be such that he might with impunity have done a certain thing, was by the terms of that Act of Parliament guilty of a crime, and could be imprisoned. I say still, as I said then, that I cannot subscribe to the propriety of that decision. I bow to it, but I cannot subscribe to it; but the majority of the judges forming the court so held because they said that the enactment was absolutely clear." BRETT, M. R., in Attorney General *v.* Bradlaugh, 14 Q. B. D. 667, 689.

"*Actus non facit reum, nisi mens sit rea* is the foundation of all criminal justice." COCKBURN, C J., in Reg. *v.* Sleep, 8 Cox C. C. 472, 477. — ED.

In my opinion, therefore, this conviction ought to be quashed.[1]

Stephen, J. I am of opinion that the conviction should be quashed. My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase "*non est reus, nisi mens sit rea.*" Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a "*mens rea*," or "guilty mind." The expression, again, is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in Shipley's Case, 4 Doug. 73; 21 St. Tr. 847, proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. It is not one of the "*regulæ juris*" in the digests. The earliest case of its use which I have found is in the "Leges Henrici Primi," v. 28, in which it is said: "*Si quis per coactionem abjurare cogatur quod per multos annos quiete tenuerit non in jurante set cogente perjurium erit. Reum non facit nisi mens rea.*" In Broom's Maxims the earliest authority cited for its use is 3d Institute, ch. i. fol. 10. In this place it is contained in a marginal note, which says that when it was found that some of Sir John Oldcastle's adherents took part in an insurrection "*pro timore mortis et quod recesserunt quam cito potuerunt,*" the judges held that this was to be adjudged no treason, because it was for fear of death. Coke adds: "*Et actus non facit reum nisi mens sit rea.*"

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[1] Concurring opinions of Cave and Hawkins, JJ., and Lord Coleridge, C. J., are omitted. Charles, Day, A. L. Smith, and Grantham, JJ., concurred. Part of the opinion of Stephen, J., is omitted. — Ed.

This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Notwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in the 21 R. 2: "*Melius est omnia mala pati quam malo consentire*" (22–23), which would show that Sir J. Oldcastle's associates had a *mens rea*, or guilty mind, though they were threatened with death, and thus contradicts the passage first quoted.

It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion.

The principle involved appears to me, when fully considered, to amount to no more than this: The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general — I might, I think, say, the invariable — practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meanings of the words "malice," "negligence," and "fraud," in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. Levet's Case, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly, *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in McNaghten's Case, 10 Cl. & F. 200, it is stated that if, under an insane delusion, one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bona fide* claim of right excuses larceny, and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: A constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the conviction ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 & 25 Vict. c. 100, s. 57, are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted; and this, it is said, is confirmed by the express proviso in the section, — an indication which is thought to negative any tacit exception. It is also supposed that the case of Reg. v. Prince, L. R. 2 C. C. 154, decided on s. 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of s. 57 of 24 & 25 Vict. c. 100. Much was said to us in argument on the old statute, 1 Jac. I. c. 11. I cannot see what this has to do with the matter. Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words "wilfully and maliciously," or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes; but there are some cases in which this cannot be said. Such are: s. 55, on which Reg. *v.* Prince, L. R. 2 C. C. 154, was decided; s. 56, which punishes the stealing of "any child under the age of fourteen years;" s. 49, as to procuring the defilement of any "woman or girl under the age of twenty-one." — in each of which the same question might arise as in Reg. *v.* Prince, L. R. 2 C. C. 154; to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under ss. 5, 6, and 7, but this is not provided for as to an offence against s. 4, which is meant to protect girls under thirteen.

It seems to me that as to the construction of all these sections the case of Reg. *v.* Prince is a direct authority. It was the case of a man who abducted a girl under sixteen, believing on good grounds that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment establishes at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not all.

The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the legislature in s. 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord Bramwell's judgment proceeds upon this principle: "The legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute."

All the judges, therefore, in Reg. *v.* Prince agreed on the general principle, though they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrong-doer should act at his peril.

As another illustration of the same principle, I may refer to Reg. *v.* Bishop, 5 Q. B. D. 259. The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 and 9 Vict. c. 100, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the Act, and the object for which it was apparently passed, and this court upheld that ruling.[1]

The application of this to the present case appears to me to be as follows: The general principle is clearly in favor of the prisoner, but how does the intention of the legislature appear to have been against her? It could not be the object of parliament to treat the marriage of widows as an act to be if possible prevented as presumably immoral. The conduct of the woman convicted was not in the smallest degree immoral; it was perfectly natural and legitimate. Assuming the facts to be as she supposed, the infliction of more than a nominal punishment on her would have been a scandal. Why, then, should the legislature be held to have wished to subject her to punishment at all?

If such a punishment is legal, the following among many other cases might occur: A number of men in a mine are killed, and their bodies are disfigured and mutilated, by an explosion. One of the survivors secretly absconds, and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I cannot believe that it can have been the intention of the legislature to make such a woman a criminal; the contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which showed, in the opinion of the judges in Reg. *v.* Prince, L. R. 2 C. C. 154, that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties to be a valid and honorable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a re-marriage after seven years' separation shall not be punishable operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases in the absence of explicit proof of death. But it seems to me to show, not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would to my mind be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger.

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[1] "I am not aware of any other way in which it is possible to determine whether the word 'knowingly' is or is not to be implied in the definition of a crime in which it is not expressed." 2 Stephen Hist. Cr. L. 117.

Manisty, J. I am of opinion that the conviction should be affirmed. The question is whether if a married woman marries another man during the life of her former husband, and within seven years of his leaving her, she is guilty of felony, the jury having found as a fact that she had reason to believe, and did honestly believe, that her former husband was dead.

The 57th section of the 24 & 25 Vict. c. 100 is as express and as free from ambiguity as words can make it. The statute says: "Whosoever being married shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony, and being convicted shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor." The statute does not even say if the accused shall feloniously or unlawfully or knowingly commit the act he or she shall be guilty of felony, but the enactment is couched in the clearest language that could be used to prohibit the act, and to make it a felony if the act is committed.

If any doubt could be entertained on the point, it seems to me the proviso which follows the enactment ought to remove it. The proviso is, that "Nothing in the 57th section of the Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

Such being the plain language of the Act, it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the legislature to alter the law if it thinks it ought to be altered.

Probably if the law was altered some provision would be made in favor of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the court to consider the reasons which induced the legislature to pass the Act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the lifetime of his or her former wife or husband, in which case it might, and in many cases would be, that several children of the second marriage would be born, and all would be bastards. The proviso is evidently founded upon the assumption that after the lapse of seven years, and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mischief of a second marriage in the lifetime of the former husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several Acts of Parliament, and is now governed by 24 & 25 Vict. c. 100, s. 57.

No doubt in construing a statute the intention of the legislature is what the court has to ascertain; but the intention must be collected from the language used; and where that language is plain and explicit, and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it.

The cases of insanity, etc., on which reliance is placed stand on a totally different principle, namely, that of an absence of *mens.* Ignorance of the law is no excuse for the violation of it; and if a person choose to run the risk of committing a felony, he or she must take the consequences if it turn out that a felony has been committed.

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony, and punishable with penal servitude or imprisonment, with or without hard labor, for any term not exceeding two years. If the crime had been declared to be a misdemeanor punishable with fine or imprisonment, surely the construction of the statute would have been, or ought to have been, the same. It may well be that the legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case; but that is a very different thing from disregarding and contravening the plain words of the Act of Parliament.

The case is put by some of my learned brothers of a married man leaving his wife and going into a foreign country intending to settle there, and, it may be, afterwards to send for his wife and children, and the ship in which he goes is lost in a storm, with, as is supposed, all on board; and after the lapse of say a year, and no tidings received of any one having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will, and marries and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired; and the question is asked, would it not be shocking that in such a case the wife could be found guilty of bigamy?

My answer is, that the Act of Parliament says in clear and express words, for very good reasons, as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that some one, for some purpose of his own, had instituted the prosecution. I need not say that no public prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my brother Stephen did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge), accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said, but the woman is put to some trouble and expense in appearing before the magistrate (who would, of course, take nominal bail) and in appearing to take her trial. Be it so, but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief if, in the vast number of cases where men in humble life leave their wives and go abroad, it would be a good defence for a woman to say and give proof, which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon, and her husband was alive.

What operates strongly on my mind is this, that if the legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question. In this view I am fortified by several sections of the same Act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in s. 23), and by a comparison of them with the section in question (s. 57), where no such words are to be found. I especially rely upon the 55th section, by which it is enacted that "whosoever shall unlawfully" (a word not used in s. 57) "take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Fifteen out of sixteen judges held, in the case of Reg. *v.* Prince, L. R. 2 C. C. 154, that, notwithstanding the use of the word "unlawfully," the fact of the prisoner believing and having reason to believe that the girl was over sixteen afforded no defence. This decision is approved of upon the present occasion by five judges, making in all twenty against the nine who are in favor of quashing the conviction. To the twenty I may, I think, fairly add Tindal, C J, in Reg. *v.* Robins, 1 C. & K. 456, and Willes, J., in Reg. *v.* Mycock, 12 Cox C. C. 28.

I rely also very much upon the 5th section of the Act passed in 1885 for the better protection of women and girls (48 & 49 Vict. c. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanor;" but to that is added a proviso that "it shall be a sufficient defence if it be made to appear to the court or jury before whom the charge shall be brought that the person charged had reasonable cause to believe, and did believe, that the girl was of or above the age of sixteen." It is to be observed that notwithstanding the word "unlawfully" appears in this section it was considered necessary to add the proviso, without which it would have been no defence that the accused had reasonable cause to believe, and did believe, that the girl was of or above the age of sixteen. Those who hold that the conviction in the present case should be quashed really import into the 57th section of the 24 & 25 Vict. c. 100, the proviso which is in the 5th section of the 48 & 49 Vict. c. 69, contrary, as it seems to me, to the decision in Reg. *v.* Prince, and to the hitherto undisputed canons for construing a statute.

It is said that an indictment for the offence of bigamy commences by stating that the accused feloniously married, etc., and consequently the principle of *mens rea* is applicable. To this I answer that it is to the language of the Act of Parliament, and not to that of the indictment, the court has to look. I consider the indictment would be perfectly good if it stated that the accused, being married, married again in the lifetime of his or her wife or husband, contrary to the statute, and so was guilty of felony.

I am very sorry we had not the advantage of having the case argued by counsel on behalf of the Crown. My reason for abstaining from commenting upon the cases cited by Mr. Henry in his very able argument for the prisoner is because the difference of opinion among some of the judges in those cases is as nothing compared with the solemn decision of fifteen out of sixteen judges in the case of Reg. *v.* Prince. So far as I am aware, in none of the cases cited by my learned brothers was the interest of third parties, such as the fact of there being children of the second marriage, involved. I have listened with attention to the judgments which have been delivered, and I have not heard a single observation with reference to this, to my mind, important and essential point. I am absolutely unable to distinguish Reg. *v.* Prince from the present case, and, looking to the names of the eminent judges who constituted the majority, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed.

The only observation which I wish to make is (speaking for myself only) that I agree with my learned brother Stephen in thinking that the phrases "*mens rea*" and "*non est reus nisi mens sit rea*" are not of much practical value, and are not only "likely to mislead," but are "absolutely misleading." Whether they have had that effect in the present case on the one side or the other it is not for me to say.

I think the conviction should be affirmed. My brothers DENMAN, POLLOCK, FIELD, and HUDDLESTON agree with this judgment.

Conviction quashed.

REGINA *v.* STEPHENS.

QUEEN'S BENCH. 1866.

[*Reported L. R.* 1 *Q. B.* 702.]

INDICTMENT. First count for obstructing the navigation of a public river called the Tivy by casting and throwing, and causing to be cast and thrown, slate stone and rubbish in and upon the soil and bed of the river, and thereby raising and producing great mounds projecting and extending along the stream and waterway of the river.

Second count that the defendant was the owner of large quantities of slate quarried from certain slate quarries near the river Tivy, and that he unlawfully kept, permitted, and suffered to be and remain large quantities of slate sunk in the river, so that the navigation of the river was obstructed.

Plea, not guilty.

The indictment was tried before Blackburn, J., at the last spring assizes for Pembrokeshire, when the following facts were proved: — The Tivy is a public navigable river which flows through Llechryd Bridge, thence by Kilgerran Castle, and from thence past the town of Cardigan to the sea. About twenty years ago the Tivy was navigable to within a quarter of a mile of Llechryd Bridge, from which place a considerable traffic was carried on in limestone and culm by means of lighters.

The defendant is the owner of a slate quarry called the Castle Quarry, situate near the Castle of Kilgerran, which he has extensively worked since 1842. The defendant had no spoil bank at the quarry. The rubbish from the quarry was stacked about five or six yards from the edge of the river. Previous to 1847, the defendant erected a wall to prevent it from falling into the river, but in that year a heavy flood carried away the wall, and with it large quantities of the rubbish. Quantities of additional rubbish were from time to time shot by the defendant's workmen on the same spot, and so slid into the river. By these means the navigation was obstructed, so that even small boats were prevented from coming up to Llechryd Bridge.

The defendant being upwards of eighty years of age was unable personally to superintend the working of the quarry, which was managed for his benefit by his sons. The defendant's counsel was prepared to offer evidence that the workmen at the quarry had been prohibited both by the defendant and his sons from thus depositing the rubbish; and that they had been told to place the rubbish in the old excavations and in a place provided for that purpose. The learned judge intimated that the evidence was immaterial; and he directed the jury that as the defendant was the proprietor of the quarry, the quarrying of which was carried on for his benefit, it was his duty to take all proper precautions to prevent the rubbish from falling into the river, and that if a substantial part of the rubbish went into the river from having been improperly stacked so near the river as to fall into it, the defendant was guilty of having caused a nuisance, although the acts might have been committed by his workmen, without his knowledge and against his general orders. The jury found a verdict of guilty.

A rule having been obtained for a new trial, on the ground that the judge misdirected the jury in telling them that the defendant would be liable for the acts of his workmen in depositing the rubbish from the quarries so as to become a nuisance, though without the defendant's knowledge and against his orders,

H. S. Giffard, Q. C., and *Poland*, showed cause.[1]

J. W. Bowen and *Hughes,* in support of the rule.

MELLOR, J. In this case I am of opinion, and in my opinion my Brother SHEE concurs, that the direction of my Brother Blackburn was right. It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here, would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no *mens rea:* that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with; still at the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants. It appears to me that all it was necessary to prove is, that the nuisance was caused in the carrying on of the works of the quarry. That being so my Brother Blackburn's direction to the jury was quite right.

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[1] Arguments of counsel are omitted.

I agree that the authorities that bear directly upon the case are very few. In the case of Reg *v.* Russell, 3 E. & B. 942, 23 L. J. M. C. 173, the observations of Lord Campbell might have been justified by the circumstances of that case, though as I understand it the judgment of the other judges did not proceed on the same reasons. It is therefore only the opinion of Lord Campbell as applied to that case. Whether there is or is not any distinction between that case and the present may be open to question; but if there is no distinction, I should be prepared rather to have acted upon the reasons which influenced the other judges than those which influenced Lord Campbell. Inasmuch as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment.

The rule must be discharged. As I have said, my Brother SHEE concurs with me in that opinion.

BLACKBURN, J. I need only add that I see no reason to change the opinion I formed at the trial. I only wish to guard myself against it being supposed that either at the trial or now, the general rule that a principal is not criminally answerable for the act of his agent is infringed. All that it is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided.

Rule discharged.

CHISHOLM *v.* DOULTON.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1889.

[*Reported* 22 *Q. B. D.* 736.]

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The respondent, the owner and occupier of certain pottery works situate in the metropolis, was summoned by the appellant, one of the chief inspectors of the metropolitan police, for having on April 18, 1888, negligently used a furnace employed in his pottery works so that the smoke was not effectually consumed or burnt, contrary to the provisions of 16 & 17 Vict. c. 128, s. 1.[1]

The magistrate dismissed the summons subject to a case, of which the material facts were as follows: Smoke issued for the space of ten minutes on the morning of the day in question from one of the respondent's furnaces, but the furnace was properly constructed, and the smoke arose by the act of the stoker or person who lighted the fire, who might by proper care have prevented the occurrence. Neither the respondent nor his foreman were guilty of any negligence. The question for the opinion of the Court was whether the respondent was liable for the negligence of the stoker.

FIELD, J. My mind has not been altogether free from doubt during the argument, but I think upon the whole that the true conclusion to arrive at upon the construction of the Act is that the respondent cannot be convicted upon the facts found by the magistrate. The offence of which it is sought to convict him is (to put it shortly) that of negligently using a furnace so as to emit black smoke, which is the thing that the legislature was desirous of preventing. The magistrate has found that the furnace was properly constructed, and that the respondent had gone to great expense in taking precautions against the discharge of smoke from his furnaces. He also found that the respondent had taken care to employ an efficient foreman to superintend the various persons having control of the furnaces. In short, the respondent was not personally guilty of any negligence whatever. The negligence which caused the emission of smoke on the particular morning in question was that of the stoker who lit the fire. And the question is, whether the respondent is criminally answerable for the negligence of his servant.

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[1] By the Smoke Nuisance (Metropolis) Act, 1853 (16 & 17 Vict c. 128, s. 1), it is provided that "every furnace employed in any mill, factory, . . . or other buildings used for the purpose of trade or manufacture within the metropolis, . . . shall in all cases be constructed or altered so as to consume or burn the smoke arising from such furnace; and if any person shall . . . within the metropolis use any such furnace which shall not be constructed so as to consume or burn its own smoke, or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed or burnt, or shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbourhood or inhabitants, without using the best practicable means for preventing or counteracting such smoke or other annoyance, every person so offending, being the owner or occupier of the premises, or being a foreman or other person employed by such owner or occupier, shall, upon a summary conviction for such offence before any justice or justices, forfeit and pay a sum of not more than five pounds nor less than forty shillings, and upon a second conviction for such offence the sum of ten pounds, and for each subsequent conviction a sum doubled the amount of the penalty imposed for the last preceding conviction."

Now the general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shewn that he had a guilty mind. And though the legislature undoubtedly may enact, as in the case of certain of the offences under this very Act it has enacted, that persons shall be criminally responsible for the doing of particular acts, even though they have no guilty mind in doing them, yet it is for the prosecution in each case to make out clearly that the legislature has in fact so enacted.

It is said that the respondent is liable because he in fact used this furnace for the purposes of his trade. I agree that he used it, for I entertain no doubt that if this were a civil proceeding for damages he would be liable, and yet he could in such proceeding only be liable if he were the person using it. But the mere use of a furnace so as to emit smoke is not an offence against the section, the offence is the using of it negligently. Suppose that by an accident which no care could have guarded against the furnace had got out of order, whereby an emission of smoke ensued, that could not be said to be an offence, for there would be no negligence. The essence of the offence is that it should be negligent. And here the respondent took all the care he could.

Looking at the cases in which it has been held that no appeal lies to the Court of Appeal from decisions relating to public nuisances, I am forced to the conclusion that this is not a mere civil proceeding, but that the offence charged against the respondent is a criminal offence. No doubt in the case of Reg. *v.* Stephens, Law Rep. 1 Q. B. 702, the learned judges came to the conclusion that in that particular case the proceeding was civil. Whether they were right or wrong in that view it is not necessary for me to express any opinion, but they carefully guarded themselves against being supposed to infringe on the general rule of law that a master is not criminally responsible for the acts of his servants. That case must be taken to stand upon its own facts. The case here being a criminal one I must apply the general rule, and by that rule the respondent must be acquitted.

The conclusion that the respondent is not criminally liable for his servant's negligence is much fortified by a comparison of the provisions of s. 1 with those of s. 2. Sect. 1 applies to a stationary thing, a furnace fixed in a building, and provides that the person to be punished shall be the " person so offending," the person, that is to say, who negligently uses the furnace ; whereas s. 2 applies to a thing which is transient, a steamer moving up or down the river, and provides that the person to be punished shall be not the " person so offending," but " the owner or master or other person having charge of such vessel." From a comparison of the language of those two sections it seems to me that in the one case the intention of the legislature was to strike at the person guilty of the negligence, while in the other, owing to the difficulty of finding out who that person was, it struck directly at the owner or person in charge. I quite admit that this construction may throw difficulties in the way of securing convictions under the former section, but I must construe the language as I find it.

I must also confess that the provision of s. 1 as to the increase of the penalties on repeated convictions raises a doubt in my mind as to the correctness of our construction. The penalty payable on the first conviction is one which, with the costs, there would be great difficulty in getting paid by a mere stoker ; and on each subsequent conviction the penalty is to be doubled, so that if the stoker is the person responsible the penalty is to be recovered from a person who is utterly unable to pay it. This certainly does seem to suggest that the person responsible is the person to whom the premises belong, and who is capable of a series of offences, the opportunity of committing which a stoker would probably not be given.

But although I feel the difficulty I think it better to be bound by the general rule of law that a man cannot be convicted of a criminal offence unless he had a criminal mind. I am therefore of opinion that the magistrate was right, and that this appeal must be dismissed.

CAVE, J. I am of the same opinion. It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge — but as a general rule there must be something of that kind which is designated by the expression *mens rea*. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice ; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. And this principle of the common law applies also to statutory offences, with this difference, that it is in the power of the legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him ; but, inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the legislature intended that A. should be punished for the fault of B.

Now apply those principles to the statute in question. Sect. 1 enacts that every furnace shall be "constructed or altered so as to consume or burn the smoke arising from such furnace." Then comes the part of the section which affixes penalties for various acts tending to produce the evil against which the legislation is directed. "If any person shall . . . use any such furnace which shall not be constructed so as to consume or burn its own smoke." Now there no condition of mind is required as an element in the offence; and we ought to hold with regard to that offence that the owner of the works, although not cognisant that his furnace is incapable of consuming its own smoke, is liable to be convicted if it in fact is so; for it is expressly enacted that if he uses a furnace not properly constructed he shall be liable to the penalty, and he certainly may use it by his servants. Then, passing over the middle clause for a moment, another part of the section enacts that if any person "shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbours or inhabitants, without using the best practicable means for preventing or counteracting such smoke or other annoyance," he shall be liable. There, again, a *mens rea* is not essential to the commission of the offence, the owner of the premises is absolutely liable if the trade is carried on in such a manner. Now go back to the clause under which the respondent has been summoned, "or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed." This differs from the other clauses in that it introduces the word "negligently," a word which imports a blamable condition of mind. If that word were not there, the owner would be responsible for the use of the furnace in such a way that the smoke was not consumed although the use was by his servants and not personally by himself. But the legislature has chosen to make negligence an essential ingredient in this particular offence. And, although the decisions under the Licensing Acts have established that, where a statute has expressly prohibited the doing of something without reference to the condition of mind of the party doing it, it may under certain circumstances, and having regard to the object of the statute, be reasonable to infer that the legislature intended that the master should be responsible if his servant disobeyed the prohibition, yet so far as I know no statute has ever yet been judicially interpreted as enacting that where negligence is an essential ingredient in the offence a master is to be responsible for the negligence of his servant.

Then is there anything else in the section which points to a different interpretation of the clause which we have to construe. I think there is not. The section goes on — "Every person so offending, being the owner or occupier of the premises, or being a foreman or other person employed by such owner or occupier," shall be liable to the penalties provided. That no doubt clearly imports that under certain circumstances the owner or occupier may be guilty of some of the offences created by the section; but it creates no difficulty, for the words would be satisfied by reference to the first-mentioned offence, that of using a furnace not properly constructed, which, as I have said, would clearly be an offence in the owner. And, further, the owner might be guilty of the offence of negligently using the furnace, provided there was personal negligence on his part, as, for instance, if he were to employ an incompetent person to attend to the furnace, or neglected to provide the person employed with the proper appliances to prevent smoke arising, or if he continued to retain in his employment a person who, by allowing smoke to be emitted, shewed that he was unfit to have the control of the furnace. On the other hand the words above referred to equally clearly import that under certain circumstances the person employed by the owner may be guilty of some of the offences created by the section and liable to the penalties thereto attached. And this, to my mind, at once disposes of the difficulty suggested with regard to the magnitude of the penalties, which it was said a stoker would be unable to pay, and which it was said consequently pointed to the owner as the sole person who was intended to be held responsible.

I should be quite content to rest my judgment on a consideration of the language of the 1st section alone. But the case for the respondent is still stronger when we come to look at the language of the 2nd section. The language under that section is very different. The legislature has there clearly expressed its intention that in the event of the stoker on board a steamer being guilty of negligence in the use of the furnace, the owner or person in charge of the vessel should be responsible. But the fact that the legislature where it intended that the master should be responsible for the negligence of the servant has expressed that intention in plain language, affords a strong reason why we should not infer such an intention where it has not expressed it clearly.

For these reasons I think that the decision of the magistrate must be affirmed. *Appeal dismissed.*

SHERRAS *v.* DE RUTZEN.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1895.

[*Reported* 1895, 1 *Q. B.* 918.]

THE appellant was the licensee of a public-house, and was convicted before a metropolitan police magistrate under s. 16, sub-s. 2, of the Licensing Act, 1872, for having unlawfully supplied liquor to a police constable on duty without having the authority of a superior officer of such constable for so doing.

It appeared that the appellant's public-house was situated nearly opposite a police-station, and was much frequented by the police when off duty and that on July 16, 1894, at about 4.40, the police constable in question, being then on duty, entered the appellant's house and was served with liquor by the appellant's daughter in his presence. Prior to entering the house the police constable had removed his armlet, and it was admitted that if a police constable is not wearing his armlet that is an indication that he is off duty. Neither the appellant nor his daughter made any inquiry of the police constable as to whether he was or was not on duty, but they took it for granted that he was off duty in consequence of his armlet being off, and served him with liquor under that belief.[1]

Day, J. I am clearly of opinion that this conviction ought to be quashed. This police constable comes into the appellant's house without his armlet, and with every appearance of being off duty. The house was in the immediate neighborhood of the police-station, and the appellant believed, and he had very natural grounds for believing, that the constable was off duty. In that belief he accordingly served him with liquor. As a matter of fact, the constable was on duty; but does that fact make the innocent act of the appellant an offence? I do not think it does. He had no intention to do a wrongful act; he acted in the *bona fide* belief that the constable was off duty. It seems to me that the contention that he committed an offence is utterly erroneous. An argument has been based on the appearance of the word "knowingly" in sub-s. 1 of s. 16, and its omission in sub-s. 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2, the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word "knowingly" in the one sub-section and its omission in the other.

It appears to me that it would be straining the law to say that this publican, acting as he did in the *bona fide* belief that the constable was off duty, and having reasonable grounds for that belief, was nevertheless guilty of an offence against the section, for which he was liable both to a penalty and to have his license indorsed.

Wright, J. I am of the same opinion. There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: Nichols *v.* Hall, Law Rep. 8 C. P. 322. One of the most remarkable exceptions was in the case of bigamy. It was held by all the judges, on the statute 1 Jac. 1, c. 11, that a man was rightly convicted of bigamy who had married after an invalid

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[1] The statement of facts has been slightly condensed. The arguments are omitted – Ed.

Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: Lolley's Case, R. & R. 237. Another exception, apparently grounded on the language of a statute, is Prince's Case, Law Rep. 2 C. C. 154, where it was held by fifteen judges against one that a man was guilty of abduction of a girl under sixteen, although he believed, in good faith and on reasonable grounds, that she was over that age. Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of LUSH, J., in Davies *v.* Harvey, Law Rep. 9 Q. B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, e. g., Attorney General *v.* Lockwood, 9 M. & W. 378, where the innocent possession of liquorice by a beer retailer was held an offence. So under the Adulteration Acts, Reg. *v.* Woodrow, 15 M. & W. 404, as to the innocent possession of adulterated tobacco; Fitzpatrick *v.* Kelly, Law Rep. 8 Q. B. 337, and Roberts *v.* Egerton, Law Rep. 9 Q. B. 494, as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier: Rex *v.* Marsh, 2 B. & C. 717. So as to the liability of a guardian of the poor, whose partner, unknown to him, supplied goods for the poor: Davies *v.* Harvey, Law Rep. 9 Q. B. 433. To the same head may be referred Reg. *v.* Bishop, 5 Q. B. D. 259, where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances: Reg. *v.* Stephens, Law Rep. 1 Q. B. 702, where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in Rex *v.* Medley, 6 C. & P. 292, and Barnes *v.* Akroyd, Law Rep. 7 Q. B. 474. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per WILLIAMS and WILLES, JJ., in Morden *v.* Porter, 7 C. B. (N. S.) 641; 29 L. J. (M. C.) 213, as to unintentional trespass in pursuit of game; Lee *v.* Simpson, 3 C. B. 871, as to unconscious dramatic piracy; and Hargreaves *v.* Diddams, Law Rep. 10 Q. B. 582, as to a *bona fide* belief in a legally impossible right to fish. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16, sub-s. 2, since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house. I am, therefore, of opinion that this conviction ought to be quashed.

Conviction quashed.

BANK OF NEW SOUTH WALES *v.* PIPER.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1897.

[*Reported* 1897, *A. C.* 383.]

THE judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this appeal was brought by the respondent against the appellants for falsely and maliciously and without reasonable or probable cause making a charge against him before a justice of the peace, upon which he was summoned to appear at the police court at Cowra in New South Wales, and was committed for trial at the court of quarter sessions at Cowra. Afterwards the attorney general refused to prosecute. The defendants pleaded not guilty. The trial took place in March, 1895, before Simpson, J., when the jury found a verdict for the plaintiff for 1000*l.* damages. On May 7, 1895, a rule nisi for a new trial or for a nonsuit or verdict for the defendants, pursuant to leave reserved at the trial, was granted by the Supreme Court. On May 11, 1896, the rule was discharged by the Chief Justice and OWEN, J., STEPHEN, J., the third judge, dissenting.

The appellants are a banking company incorporated in the Colony of New South Wales by Act of Parliament and Deed of Settlement. The respondent is a farmer and grazier residing near Cowra. By a deed of mortgage dated February 29, 1892, the respondent assigned to the appellants by way of mortgage 2050 sheep, ninety-five head of cattle, and twelve horses, as a collateral security for credit advances and accommodation to the extent of 250*l.* in account current which the bank had agreed to grant to him. The mortgage was duly executed and registered in accordance with the provisions of the Act 11 Vict. No. 4. Sect. 7 of that Act is as follows: —

"And whereas it is expedient, with a view to increase the public confidence in the validity of such preferable liens on wool and mortgages of live stock to surround them with the penal provisions necessary for the punishment of frauds: Be it enacted that any grantor of any such preferable lien on wool or of any mortgage of sheep, cattle, or horses and of their increase and progeny under this Act, whether such grantor shall be principal or agent, who shall afterwards by the sale or delivery of the wool under any such lien, without the written consent of the lienee, to any purchaser, pawnee, or other person, or by selling, steaming, or boiling down or causing to be sold, steamed, or boiled down without such written consent as aforesaid the sheep whereon the same shall be growing with a view to defraud such lienee of such wool or of the value thereof, or who shall, after the due execution and registry of any such mortgage, without the written consent of the mortgagee thereof, sell or dispose of or steam or boil down, or cause to be sold and disposed of or to be steamed or boiled down, any sheep, cattle, or horses or their increase or progeny, or who shall in any way or by any means whatsoever or howsoever directly or indirectly destroy, defeat, invalidate, or impair, or any other person or persons who shall wilfully and knowingly incite, aid, or abet any such grantor directly or indirectly to defeat, destroy, invalidate or impair the right of property of any lienee in the wool of any sheep mentioned and described in any such registered agreement as aforesaid, or the right of property of any such mortgagee as aforesaid, in any sheep, cattle, or horses or their increase and progeny mentioned in any mortgage duly executed and registered as aforesaid, under the provisions of this Act, shall be severally held and deemed guilty of an indictable fraud and misdemeanor; and being thereof duly convicted, shall be severally liable, in the discretion of the judge or Court before whom any such offender shall be so convicted, to fine or imprisonment, or to both fine and imprisonment, for any period not exceeding three years with or without hard labor at the discretion of such Court or judge."

In May, 1893, whilst the mortgage was subsisting, and the respondent was indebted thereon to the appellants in about 240*l.*, the respondent, without their written consent, sold and delivered to one Robert Philip King 645 sheep and a number of cattle, part of the sheep and cattle included in the mortgage. On November 3, 1893, James Thomas Evans, the manager of the bank at Cowra, swore an information under s. 7 before a justice of the peace that the respondent on or about May 19, 1893, without the written consent of the bank, sold and disposed of the sheep and cattle to King. Upon this information the respondent was brought before the justice of the peace and committed for trial, but the Attorney-General, as already stated, refused to file a bill against him. The action was then brought.

At the trial the respondent admitted the execution and registration of the mortgage and the sale to King, and did not suggest or set up that at the time of the sale he had or believed himself to have the written consent of the appellants or their manager to the sale; but he swore that before the sale he obtained the verbal consent of Evans to it. At the close of the respondent's case the appellants' counsel applied for a nonsuit on the ground that on the respondent's evidence he was in fact guilty of the offence with which he had been charged, and that even if it were proved that the appellants had given a verbal consent to the sale, it would afford no answer to the charge; and that, therefore, upon the admitted facts there was reasonable and probable cause for the information and charge. The learned judge declined to nonsuit, but reserved leave to the appellants to move to enter a nonsuit or a verdict for them. Evans was then examined as a witness for the appellants. He denied that he gave the respondent any authority orally or in writing to make the sale to King; but the jury, in answer to the first question put to them by the learned judge, found that

Evans did verbally authorize the sale. That must therefore be taken as the fact. Two other questions were submitted to the jury, one being: "Did Evans entertain an honest belief that the plaintiff was guilty of the offence charged in the information, and, if so, was his belief founded on such reasonable grounds as would lead an ordinarily prudent and cautious man, placed in the position of Mr. Evans, to the conclusion that the plaintiff was probably guilty of the offence?" and the other: "Did Evans honestly believe that the plaintiff, having sold and disposed of certain sheep and cattle, covered by the mortgage to the bank, without written authority, although he may have had verbal authority, was guilty of an indictable offence under 11 Vict. No. 4, s. 7, and, if so, was his belief founded on such reasonable grounds as would lead a fairly cautious and prudent man in the position of Mr. Evans to entertain such belief?" To both these questions the jury answered "No."

The decision of the question whether there was reasonable or probable cause for the charge depends upon the construction of s. 7. It was for the judge to decide that question, as a matter of law, upon the facts admitted or found by the jury. It is to be observed that in the first part of s. 7, which relates to the sale or delivery of wool that is under a lien, the words "with a view to defraud" are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged, these words are omitted. This cannot be considered to be an unintentional omission unless it is shewn to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words "with a view to defraud" had been inserted in this part of it. They cannot alter the offence created by the statute by the introduction of words which the Legislature has omitted.

It was certainly competent to the Legislature of New South Wales to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial, and the question is whether in the case of the sale by the mortgagor it has not done so. The enactment in this part of s. 7, according to the ordinary meaning of the words, appears to their Lordships to provide that the selling without a written consent shall be punished as if it were a fraud. In their Lordships' opinion neither the preamble to the 7th section nor the enactment that the persons offending shall be held and deemed guilty of an indictable fraud justifies the opinion that an intent to defraud must be implied, or that it is open to the person charged to give evidence to rebut the presumption of fraud. It is the intention of the Legislature to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence. It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by shewing that such *mens* did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of Sherras *v.* De Rutzen, [1895] 1 Q. B. 918, where the conviction of a publican for the offence of selling drink to a constable on duty was set aside by the court because the accused believed, and had reasonable grounds for the belief, that the constable was not on duty at the time, is an illustration of its absence. The circumstances of the present case are far from indicating that there was no *mens rea* on the part of the respondent. He must be presumed to have known the provisions of s. 7, whether he was actually acquainted with its terms or not. Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as *mens rea*. If the offence of which the offender is convicted is a venial one, the Act puts it within the discretion of the judge who tries the case to award a nominal punishment. At the end of the defendants' case the learned judge ought to have ruled that, there being no written consent, there was reasonable and probable cause for making the charge in the information, and he should have directed the jury to find a verdict for the defendants. The questions which were submitted to the jury were unnecessary, and ought not to have been submitted. Their Lordships will therefore humbly advise Her Majesty to discharge the order of the Supreme Court, and to order the rule to enter a verdict for the defendants to be made absolute with costs. The respondent will pay the costs of this appeal.

MYERS *v.* STATE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1816.

[*Reported* 1 *Connecticut*, 502.]

THIS was an information, brought before the county court, on the statute,[1] for suffering and allowing A. M. and others to travel in a hackney-coach owned by the defendant, from New Haven to Middletown, on the Sabbath-day.[2]

The court charged the jury that it was incumbent on the defendant, if he justified his act as a case of necessity or charity, to prove by evidence on the trial that a case of necessity or charity existed, and that the representation of the passenger to the driver did not in law amount to a justification, unless the same was proved to have been true when made.

SWIFT, C. J.[3] The letting of a carriage on Sunday, on the ground of necessity or charity, is not prohibited by the statute. If then a man acts honestly on such principle, and really believes that the case of necessity or charity exists, he is not criminal. It is true, a man may be deceived and imposed upon by falsehood and misrepresentation; yet if he verily believes that the case exists, and acts on that ground, it is as much a deed of charity in him, if the fact does not exist, as if it does. It is a letting of the carriage as a matter of charity. Unless this construction be adopted, a man may be convicted of a crime when he had no intent to violate the law, and when his object was to perform a deed of charity conformable to law. This would oppugn the maxim that a criminal intent is essential to constitute a crime.

It is true, on this construction, attempts may be made to evade the statute; but in all cases it will be a question of fact to the jury whether the party acted under a serious impression of the truth of the representation made to him. If there be any appearance of collusion, any management to elude the statute, then the excuse ought not to avail; and by the exercise of a proper discretion the violation of this law may commonly be prevented. But on a different construction, all works of charity would be prevented. If a man is bound to prove not only that he believed it to be an act of charity, but that the facts existed, otherwise he should be liable to be punished, there would be very great danger in performing the charity which the statute does not prohibit.

The court, then, in charging the jury that the facts constituting the act of charity must be proved to have existed, committed an error.

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[1] Oct. Sess. 1814, c. 17. "No proprietor . . . of any coach . . . shall suffer or allow any person or persons to travel, except from necessity or charity, in such carriage, within this state, on the Sabbath or Lord's day."

[2] The statement of facts has been abridged.

[3] The concurring opinion of GOULD, J., is omitted.

They should have directed the jury, if they found that the defendant had reasonable ground to believe from the representation made to him that the case of charity existed, and that he honestly acted under the impression of that belief, they ought to find him not guilty.

I am of opinion there is error in the judgment of the county court.[1]

BIRNEY *v.* STATE.

SUPREME COURT OF OHIO. 1837.

[*Reported* 8 *Ohio*, 230.]

JUDGE WOOD[2] delivered the opinion of the court.

The statute upon which this indictment is predicated enacts "that if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall, on conviction thereof, be fined any sum not less than ten nor more than fifty dollars." We are first called to consider whether, under this enactment, the indictment is sufficient.

It is required that every indictment shall have a precise and sufficient certainty. The omission of a word of substance is fatal. (2 Haw. P. C. chap. 25, s. 4.) Here the plaintiff in error is charged with harboring and secreting a certain mulatto girl by the name of Matilda, the property of L. Larkin. There is no averment that the plaintiff in error knew the facts alleged, that Matilda was a slave and the property of L. Larkin, or of any other person; and such is not the legal inference, in a state whose constitution declares that all are born free and equal, and that there shall be neither slavery nor involuntary servitude within its limits, except as a punishment for the commission of crimes. On the contrary, the presumption is in favor of freedom. The *scienter*, or knowledge of the plaintiff in error, of this material fact was an ingredient necessary to constitute his guilt. This knowledge should have been averred in the indictment, and proved on the trial; for without such knowledge the act charged as a crime was innocent in its character. We know of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself. "*Ignorantia facti* doth excuse, for such an ignorance, many times, makes the act itself morally involuntary." 1 Hale's P. C. 42.

It is true that the statute upon which the indictment is founded omits the *scienter*, and the indictment covers all the facts enumerated in that statute. But this is not sufficient; it cannot be assumed that an act which, independent of positive enactment, involves no moral wrong, nay, an act that in many cases would be highly praiseworthy, should be made grievously criminal, when performed in total unconsciousness of the facts that infect it with crime. This court has determined differently. In the case of Anderson against the State, 7 Ohio Rep. part 1, 255, the plaintiff in error was indicted for uttering and publishing forged certificate of deposit, without averring his knowledge of such forgery. The statute under which the indictment was found does not, in express terms, make this knowledge a constituent of the crime. Nevertheless, the court held that the criminality could not exist without the knowledge, and that an indictment that did not aver it was defective. That case runs upon all fours with this, and the further investigation of the principles upon which it is based confirms the court in the conviction that it is correct. This judgment must be reversed for this cause, and it thus becomes unnecessary to decide upon the other points, so laboriously argued for the plaintiff in error, and of a character too important in their bearing upon the whole country, to be adjudicated upon without necessity.[1]

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[1] See Bradley *v.* People, 8 Col. 599. — ED

[2] The opinion only is given; it sufficiently states the case.

COMMONWEALTH *v.* MASH.

Supreme Judicial Court of Massachusetts. 1844.

[*Reported 7 Metcalf*, 472.]

The defendant was indicted, on the Rev. Sts. c. 130, s. 2, for marrying a second husband while her former husband was living.

At the trial in the Municipal Court, at August term, 1843, there was evidence tending to prove that the defendant was married to Peter Mash on the 7th of December, 1834, and that she afterwards cohabited with him until about the 10th of November, 1838, when he left home in the morning, saying he should return to breakfast, and was not afterwards heard from by the defendant till about the middle of May, 1842, when he returned; that on the 10th of April, 1842, she was married, in Boston, by a clergyman of competent authority to solemnize marriages in this Commonwealth, to William M. Barrett, with whom she cohabited in Boston until she heard that said Peter Mash was still living, when she immediately withdrew from said Barrett, and had no intercourse with him afterwards; that she was of uniformly good character and virtuous conduct, and that she honestly believed, at the time of said second marriage, that said Peter Mash was dead; that during his absence, as aforesaid, she made many inquiries, and was unable to obtain any information concerning him, or to ascertain whether he was or was not alive.

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[1] See U. S. *v.* Beaty, Hempst. 489; Lee *v.* Lacey, 1 Cranch C. C. 263; conf. State *v.* B. & S. Steam Co. 13 Md. 181. — Ed.

The counsel for the defendant moved the court to instruct the jury that if they believed all the facts which the aforesaid evidence tended to prove, she was entitled to an acquittal. But the court refused so to instruct the jury, and instructed them that the defendant's ignorance that her said husband, Peter Mash, was alive, and her honest belief that he was dead, constituted no legal defence.

The jury found the defendant guilty, and she filed exceptions to the instruction of the court.

Hallett, for the defendant.

S. D. Parker, for the Commonwealth.

SHAW, C. J. The court are of opinion that the instruction to the jury was right. The rule of law was certainly strongly expressed by the judge, no doubt in consequence of the terms in which the motion of the defendant's counsel was expressed. The rule, as thus laid down, in effect was, that a woman whose husband suddenly left her without notice, and saying, when he went out, that he should return immediately, and who is absent between three and four years, though she have made inquiry after him, and is ignorant of his being alive, but honestly believes him to be dead, if she marries again is guilty of polygamy. The correctness of this instruction must of course depend upon the construction of the Rev. Sts. c. 130, which regulate this subject. The second section imposes a penalty upon any person who, having a former husband or wife, shall marry another person ; with some exceptions. The third section excepts from the operation of the statute "any person whose husband or wife shall have been continually remaining beyond sea, or shall have voluntarily withdrawn from the other, and remained absent for the space of seven years together, — the party marrying again not knowing the other to be living within that time."

It appears to us that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, while the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one should have a right, upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time. It is analogous to other provisions and rules of law, by which a continued absence of a person for seven years, without being heard of, will constitute a presumption of his death. Loring *v.* Steineman, 1 Met. 204 ; Greenl. on Ev. s. 41.

We are strongly confirmed in this construction of the statute, and that such was the deliberate expression of the legislative will, by reference to the report of the commissioners for revising the statutes. It appears, by their report upon this provision, that they prescribed a much more mitigated rule, and proposed to extend the exception "to any person whose former husband or wife, having been absent one year or more at the time of such second marriage, shall be believed to be dead." This proposal was stricken out by the committee appointed to consider the report of the commissioners, and the legislature adopted their amendment, and passed the law as it stands, without the proposed additional exception. This shows at least that the attention of the legislature was called to the subject, and that it was by design, and not through inadvertence, that the law was framed as it is.

It was urged in the argument that where there is no criminal intent, there can be no guilt; and if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense; but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does, he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits.

Exceptions overruled.[1]

[The court did not pass sentence on the defendant, but took a recognizance for her appearance in court at a future day. On the 9th of July, 1844, the defendant received a full pardon from the governor, which she brought into court on the 15th of said July, and pleaded the same in bar of sentence. Whereupon the court ordered her to be discharged.]

COMMONWEALTH v. BOYNTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 2 *Allen*, 160.]

INDICTMENT against the defendant for being a common seller of intoxicating liquor. At the trial in the Superior Court, after certain sales of beer had been testified to, the defendant offered evidence to prove that the article sold was not intoxicating, and that, if it were so, he had no reason to suppose that it was so, and bought it for beer which was not intoxicating, and did not believe it to be intoxicating; but Brigham, J., rejected the latter part of the evidence offered, and instructed the jury that if the defendant sold liquor which was intoxicating, as alleged, he might be found guilty, although he did not know or suppose that it was so. The defendant was convicted, and alleged exceptions.

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[1] See, *contra*, Squire v. State, 46 Ind. 459. — ED.

J. Q. A. Griffin for the defendant.

Foster, Attorney-General, for the Commonwealth.

Hoar, J. The court are of opinion that the sale of intoxicating liquors in violation of the statute prohibition is not one of those cases in which it is necessary to allege or prove that the person charged with the offence knew the illegal character of his act; or in which a want of such knowledge would avail him in defence. If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold. Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he knew that he could do so lawfully, if he violates the law he incurs the penalty. The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases. And the hardship is no greater where the law imposes the duty to ascertain a fact.

It could hardly be doubted that it would constitute no defence to an indictment for obstructing a highway, if the defendant could show that he mistook the boundaries of the way, and honestly supposed that he was placing the obstruction upon his own land. The same principle was applied in the case of bigamy, Commonwealth *v.* Mash, 7 Met. 472; and in the case of adultery, Commonwealth *v.* Elwell, 2 Met. 190.

Exceptions overruled.[1]

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[1] See *acc.* Com. *v.* Farren, 9 All. 489; State *v.* Smith, 10 R. I. 258 (selling adulterated milk); State *v.* Stanton, 37 Conn. 421 (selling adulterated liquor).

Contra, Teague *v.* State, 25 Tex. App. 577 (selling diseased meat).

On the same principle it has been held that one is guilty (under a statute forbidding it) for allowing a minor to remain in his billiard saloon, though he did not know that the youth was a minor. State *v.* Probasco, 62 Ia. 400. (See, *contra*, Marshall *v.* State, 49 Ala. 21; Stern *v.* State, 53 Ga. 229.) The same decision has been reached in a prosecution upon a statute forbidding the sale of intoxicating liquor to a minor. McCutcheon *v.* People, 69 Ill. 601; Ulrich *v.* Com., 6 Bush, 400; *In re* Carlson's License, 127 Pa. 330; State *v.* Hartfiel, 24 Wis. 60. (See, *contra*, Mulreed *v.* State, 107 Ind. 62.) So in the case of a sale to a common drunkard. Barnes *v.* State, 19 Conn. 398. (See, *contra*, Williams *v.* State, 48 Ind. 306).

On the same ground one is held guilty under a statute forbidding the sale of oleomargarine, though he sold oleomargarine in ignorance of its real nature. State *v.* Newton, 50 N. J. 534; Com. *v.* Weiss, 139 Pa. 247.

See also U. S. *v.* Leathers, 6 Sawy. 17; People *v.* Harris, 29 Cal. 678; State *v.* Welch, 21 Minn. 22. — Ed.

STATE *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

SUPREME COURT OF IOWA. 1903.

[*Reported* 122 *Ia.* 22.]

LADD, J.[1] The defendant admitted the failure of its train to stop within 800 feet and more than 200 feet from the crossing, and interposed the defence that the engineer in charge did all he could to stop it, but that, owing to the brakes not working in the usual manner, the momentum of the train carried it over the crossing. The court submitted the case to the jury on the theory that the burden of proof was on the defendant, in order to exonerate itself from liability, to show by a preponderance of evidence that the failure to stop was not due to any negligence on the part of its employees in operating the train, or of the company in not having proper appliances, or in keeping those had in proper condition, and that the company might be liable even though the engineer was not. Possibly that should have been the law, but it was not so written by the legislature. The statute in question reads: " All trains run upon any railroad in this state which intersects or crosses any other railroad on the same level shall be brought to a full stop at a distance of not less than two hundred and not more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed, except as otherwise provided in this chapter. Any engineer violating the provisions of this section shall forfeit one hundred dollars for each offence, to be recovered in an action in the name of the State for the benefit of the school fund, and the corporation on whose road the offence is committed shall forfeit the sum of two hundred dollars for each offence, to be recovered in like manner." Section 2073, Code. The latter part of the statute is purely penal in character, with the evident object of punishing the offender, rather than afford a remedy for the wrongful act. In this respect it differs radically from provisions awarding damages flowing from certain acts, such as the setting out of fire. Its meaning, then, cannot be extended beyond the terms employed. But one offence is denounced by it, and that is the omission of the engineer to stop the train as required. The first sentence commands what shall be done — defines a duty; the first clause of the second sentence imposes a penalty on any engineer for " each offence " of omitting such duty; the second clause of the second sentence adds a penalty against the corporation "on whose road such offence is committed." To what do these last words refer? Manifestly, to the offence of which the engineer is guilty.

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[1] Part of the opinion only is given. — ED.

No other is mentioned in the section. The statute cannot be fairly read otherwise. The thought seems to have been that, as the engineer controls the train, the fault in failing to stop as required is primarily his, and secondarily that of the company for which he acts. There is no ground for holding that the company may be liable independent of any fault of the engineer. The forfeiture of the corporation is made to depend upon his guilt of the offence defined, and upon that only.

As the statute is purely penal in character, it ought not to be construed as fixing an absolute liability. A failure to stop may sometimes occur, notwithstanding the utmost efforts of the engineer. In such even this omission cannot be regarded as unlawful. The law never designs the infliction of punishment where there is no wrong. The necessity of intent of purpose is always to be implied in such statutes. An actual and conscious infraction of duty is contemplated. The maxim, "*Actus non facit reum nisi mens sit rea*," obtains in all penal statutes unless excluded by their language. See Regina *v.* Tolson, 23 Q. B. Div. 168, where it was said, "Crime is not committed where the mind of the person committing the act is innocent." See, also, Sutherland on Statutory Construction, section 354 *et seq.* No doubt many statutes impose a penalty regardless of the intention of those who violate them, but these ordinarily relate to matters which may be known definitely in advance. In such cases commission of the offence is due to neglect or inadvertence. But even then it can hardly be supposed the offender would be held if the act were committed when in a state of somnambulism or insanity. As it is to be assumed in the exercise of the proper care that the engineer has control of his train at all times, proof of the mere failure to stop makes out a *prima facie* case. But this was open to explanation, and if, from that given, it was made to appear that he made proper preparation, and intended to stop, and put forth every reasonable effort to do so, he should be exonerated. See Furley *v.* Ry. Co., 90 Iowa, 146.

SECTION II.

The mens rea : Intent.

REGINA *v.* SHARPE.

CROWN CASE RESERVED. 1857.

[*Reported* 7 *Cox C. C.* 214.]

THE defendant was tried at Hertford, before Erle, J., who reserved the following case : —

The indictment in the first count charged that the defendant, a certain burial-ground belonging to a certain meeting-house of a congregation of Protestants dissenting from the Church of England, unlawfully did break and enter, and a certain grave there, in which the body of one Louisa Sharpe, had before then been interred, with force and arms, unlawfully, wilfully, and indecently did dig open, and the said body of the said Louisa Sharpe out of the said grave, unlawfully, wilfully, and indecently did take and carry away.

And there were other counts, varying the charge, which may be resorted to if necessary. The evidence was, that the defendant's family had belonged to a congregation of dissenters at Hitchin, and his mother, with some other of his relations, had been buried in one grave in the burying-ground of that congregation there, with the consent of those who were interested. That the father of the defendant had recently died. That the defendant prevailed on the wife of the person to whom the key of the burying-ground was intrusted to allow him to cause the grave above mentioned to be opened, under the pretext that he wished to bury his father in the same grave, and, in order thereto, to examine whether the size of the grave would admit his father's coffin. That he caused the coffins of his stepmother and two children to be taken out, and so came to the coffin of his mother, which was under them, and was much decomposed, and that he caused the remains of this coffin, with the corpse therein, to be placed is no authority for saying that relationship can justify the taking of a corpse from the grave where it had been laid. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant; but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters. The result is, the conviction will stand, and, as the judge states, the sentence should be a nominal fine of one shilling. *Conviction affirmed.*[1]

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[1] See Rex *v.* Ogden, 6 C. & P. 631. — ED.

REGINA *v.* PRINCE.

COURT FOR CROWN CASES RESERVED. 1875.

[*Reported L. R.* 2 *C. C.* 154.]

CASE stated by DENMAN, J.

At the assizes for Surrey, held at Kingston-upon-Thames, on the 24th of March last, Henry Prince was tried upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. The indictment was framed under s. 55 of 24 & 25 Vict. c. 100.

He was found guilty.

All the facts necessary to support a conviction existed, unless the following facts constituted a defence. The girl Annie Phillips, though proved by her father to be fourteen years old on the 6th of April following, looked very much older than sixteen, and the jury found upon reasonable evidence that before the defendant took her away she had told him that she was eighteen, and that the defendant *bona fide* believed that statement, and that such belief was reasonable.

If the Court should be of opinion that under these circumstances a conviction was right, the defendant was to appear for judgment at the next assizes for Surrey; otherwise the conviction was to be quashed: see Reg. *v.* Robins, C. & K. 546, and Reg. *v.* Olifier, 10 Cox, Cr. C. 402.

BRETT, J.[1] . . . It would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offence really charged as a crime. In some enactments, or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name of the crime imports that a *mens rea* must be proved, as in murder, burglary, etc. In some the *mens rea* is contained in the specific enactments as to the intent which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanor, the word "unlawfully" is used instead of the word "feloniously." What reason is there why, in like manner, a criminal mind, or *mens rea*, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea?* But even in those cases it is open to the prisoner to rebut the *prima facie* evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime.

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[1] Part of this dissenting opinion is omitted. — ED.

There are enactments which by their form seem to constitute the prohibited acts into crimes, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the prohibited acts into crime, or offences against the Crown, but only prohibit them for the purpose of protecting the individual interest of individual persons, or of the revenue. Thus, in Lee *v.* Simpson, 3 C. B. 871; 15 L. J. (C. P.) 105, in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to shew that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by WILDE, C. J., 3 C. B. at p. 883. is: "The object of the legislature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offence against the Act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant." So the decision in Morden *v.* Porter, 7 C. B. (N. S.) 631; 29 L. J. (M. C.) 218, seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them, and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by shewing that his ultimate object or secondary intent was not immoral: Reg. *v.* Hicklin, Law Rep. 3 Q. B. 360. This and similar decisions go rather to shew what is *mens rea*, than to shew whether there can or cannot be conviction for crime proper without *mens rea*.

As to the last question, it has become very necessary to examine the authorities. In Blackstone's Commentaries, by Stephen, 2d ed., vol. iv., Book 6, Of Crimes, p. 98. "And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will. Now there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding, etc.; 2. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it." And at p. 105: "Ignorance or mistake is another defect of will, when a man, intending to do a lawful act, does that which is unlawful; for here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder." In Fowler *v.* Padget, 7 T. R. 509, the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors, but that delay did actually happen to some creditors. Lord Kenyon said: "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice and of our laws that *actus non facit reum nisi mens sit rea.* The intent and the act must both concur to constitute the crime." And again: "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for."

In Hearne *v.* Garton, 2 E. & E. 16; 28 L. J. (M. C.) 216, the respondents were charged upon an information for having sent oil of vitriol by the Great Western Railway without marking or stating the nature of the goods. By 20 & 21 Vict. c. 43, s. 168, "every person who shall send or cause to be sent by the said railway any oil of vitriol, shall distinctly mark or state the nature of such goods, etc., on pain of forfeiting, etc." By s. 206 such penalty is recoverable in a summary way before justices, with power to imprison, etc. The respondents had in fact sent oil of vitriol unmarked. But the justices found that there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed that in that case, as in the present, the respondents did in fact the prohibited acts, and that in that case as in this, it was found, as the ultimate proof, that they were deceived into the belief of a different and non-criminal state of facts, and had used all proper diligence. The case is stronger, perhaps, than the present by reason of the word "unlawfully" being absent from that statute. The Court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and therefore that there must be a criminal mind, which there was not. "As to the latter reason I think the justices were perfectly right: *actus non facit reum nisi mens sit rea.* The act with which the respondents were charged is an offence created by statute, and for which the person committing it is liable to a penalty or to imprisonment; not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them. I am inclined to think they were civilly liable:" Lord Campbell, C. J. "I was inclined to think at first, that the provision was merely protective; but if it create a criminal offence, which I am not prepared to deny, then the mere sending by the respondents, without a guilty knowledge on their part, would not render them criminally liable, although, as they took Nicholas's word for the contents of the parcel, they would be civilly liable:" Erle, J.

In Taylor v. Newman, 4 B. & S. 89; 32 L. J. (M. C.) 186, the information was under 24 & 25 Vict. c. 96, s. 23: "Whosoever shall unlawfully and wilfully kill, etc., any pigeon, etc." The appellant shot pigeons on his farm belonging to a neighbor. The justices convicted on the ground that the appellant was not justified by law in killing the pigeons, and, therefore, that the killing was unlawful. In other words they held that the only meaning of "unlawfully" in the statute was "without legal justification." The Court set aside the conviction. "I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right." Mellor, J.

In Buckmaster v. Reynolds, 13 C. B. (N. S.) 62, an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election at a vestry. The evidence was that the defendant did obstruct the election because he forced himself and others into the room before eight o'clock, believing that eight o'clock was passed. The question asked was, whether an intentional obstruction by actual violence is an offence, etc. This question the Court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts. But Erle, J., continued: "I accompany this statement (i. e. the answer to the question) by a statement that upon the facts set forth I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act. Here it seems that the respondent acted in the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

In Reg. v. Hibbert, Law Rep. 1 C. C. 184, the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls and induced them to go to Manchester. At Manchester he took them to a public house and there seduced the girl in question, who was under sixteen. The prisoner made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not believe that she was a girl of the town. The jury found the prisoner guilty, and LUSH, J., reserved the case. In the Court of Criminal Appeal, BOVILL, C. J., CHANNELL and PIGOTT, BB., BYLES and LUSH, JJ., quashed the conviction. BOVILL, C. J.: "In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point the conviction cannot be supported." This case was founded on Reg. *v.* Green, 3 F. & F. 274, before MARTIN, B. The girl was under fourteen, and lived with her father, a fisherman, at Southend. The prisoners saw her in the street by herself and induced her to go with them. They took her to a lonely house, and there Green had criminal intercourse with her. MARTIN, B., directed an acquittal: "There must, he said, be a taking out of the possession of the father. Here the prisoners picked up the girl in the street, and for anything that appeared, they might not have known that the girl had a father. The girl was not taken out of the possession of any one. The prisoners, no doubt, had done a very immoral act, but the question was whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offence."

In each of these cases the girl was surely in the legal possession of her father. The fact of her being in the street at the time could not possibly prevent her from being in the legal possession of her father. Everything, therefore, prohibited was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished.

In Reg. *v.* Tinckler, 1 F. & F. 513, in a case under this section, COCKBURN, C. J., charged the jury thus: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes's custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal." The jury found the prisoner not guilty.

In Reg. *v.* Sleep, 8 Cox, Cr. C. 472, the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to the question whether the prisoner knew that the copper, or any part of it was marked, answered, "We have not sufficient evidence before us to shew that he knew it." The Court of Criminal Appeal held that the prisoner could not be convicted. COCKBURN, C. J.: *Actus non facit reum nisi mens sit rea* is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this statute, as it was held in Reg. *v.* Cohen, 8 Cox, Cr. C. 41, where this conclusion of the law was stated by HILL, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute." POLLOCK, C. B., MARTIN, B., CROMPTON and WILLES, JJ., agreed.

In the cases of Reg. *v.* Robins, 1 C. & K. 456, and Reg. *v.* Olifier, 10 Cox, Cr. C. 402, there was hardly such evidence as was given in this case, as to the prisoner being deceived as to the age of the girl, and having reasonable grounds to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case.

In Reg. *v.* Forbes and Webb, 10 Cox, Cr. C. 362, although the policeman was in plain clothes, the prisoners certainly had strong ground to suspect, if not to believe, that he was a policeman; for the case states that they repeatedly called out to rescue the boy and pitch into the constable.

Upon all of the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or *mens rea*.

Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime. As if a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts, without caring to consider what the truth is as to facts — as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen — he runs the risk. So if he without abduction defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offence at all.

It may be true to say that the meaning of the word "unlawfully" is that the prohibited acts be done without justification or excuse; I, of course, agree that if there be a legal justification there can be no crime; but I come to the conclusion that a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord KENYON that "such is our law," and with COCKBURN, C. J., that "such is the foundation of all criminal procedure."

BRAMWELL, B.[1] The question in this case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause," such as would exist, for instance, on a taking by a police officer on a charge of felony, or a taking by a father of his child from his school. The statute, therefore, may be read thus: "Whosoever shall take, etc., without lawful cause." Now the prisoner had no such cause, and consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may in the present case be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen out of the possession of and against the will of her father? In fact, he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly," or some equivalent word, was in; and the reason given is, that as a rule the *mens rea* is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no *mens rea*. I have used the word "knowingly;" but it will, perhaps, be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*, there is not one when, as he believes, he knows that she is over sixteen.

It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offence unless he, the taker, knows she is under sixteen; that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," etc. Those words are not there, and the question is, whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong.

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[1] In this opinion KELLY, C. B., CLEASBY, POLLOCK and AMPHLETT, BB., and GROVE, QUAIN, and DENMAN, JJ., concurred. BLACKBURN, J., also delivered an opinion supporting the conviction, in which COCKBURN, C. J., MELLOR, LUSH, QUAIN, DENMAN, ARCHIBALD, FIELD, and LINDLEY, JJ., and POLLOCK, B., concurred. — ED.

Let us remember what is the case supposed by the statute. It supposes that there is a girl — it does not say a woman, but a girl — something between a child and a woman; it supposes she is in the possession of her father or mother, or other person having lawful care or charge of her; and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is, then, a taking of a girl, in the possession of some one, against his will. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself; she is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or charge of anyone. I am asked where I draw the line; I answer at when the female is no longer a girl in anyone's possession.

But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute — an act which, if he knew that she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.

In addition to these considerations, one may add that the statute does use the word "unlawfully," and does not use the words "knowingly" or "not believing to the contrary." If the question was whether his act was unlawful, there would be no difficulty, as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Sect. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sect. 51 enacts when she is above ten and under twelve to unlawfully and carnally know her is a misdemeanor. Can it be supposed that in the former case a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor; or that he believed her over twelve, and so had committed no offence at all; or that in a case under s. 51 he could claim to be acquitted, because he believed her over twelve? In both cases the act is intrinsically wrong; for the statute says if "unlawfully" done. The act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So s. 56, by which, whoever shall take away any child under fourteen with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over fourteen?" If not, then neither could he say, "I did take the child with intent to deprive the parent of its possession, and I believed it over fourteen." Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if those words cannot be introduced in s. 56, why can they be in s. 55?

The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. (10 Cox, Cr. C. 362.) Why? because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in housebreaking, that he did not know the place broken into was a house? Take also the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no *mens rea.* Why? because the act of publishing written defamation is wrong where there is no lawful cause.

As to the case of the marine stores, it was held properly that there was no *mens rea* where the person charged with the possession of naval stores with the Admiralty mark did not know the stores he had bore the mark: Reg. *v.* Sleep, 8 Cox, Cr. C. 472; because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose his servant had told him that there was a mark, and he had said he would chance whether or not it was the Admiralty mark? So in the case of the carrier with game in his possession; unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders; there was nothing wrong in sending such packages as were sent unless they contained vitriol.

Further, there have been four decisions on this statute in favour of the construction I contend for. I say it is a question of construction of this particular statute in doubt, bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety. I think the conviction should be affirmed.

DENMAN, J. I agree in the judgment of my Brothers BRAMWELL and BLACKBURN, and I wish what I add to be understood as supplementary to them. The defendant was indicted under the 24 & 25 Vict. c. 100, s. 55, which enacts that "whosoever shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor."

I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being supported or negatived by evidence upon the trial: see Reg. *v.* Turner, 2 Moo. Cr. C. 41; Reg. *v.* Ryan, 2 Hawk. P. C. C. 25, § 96.

In the present case the jury found that the defendant had done everything required to bring himself within the clause as a misdemeanant, unless the fact that he *bona fide* and reasonably believed the girl taken by him to be eighteen years old constituted a defence. That is in other words, unless such *bona fide* and reasonable belief prevented them from saying that the defendant in what he did acted "unlawfully" within the meaning of the clause. The question, therefore, is whether, upon this finding of the jury, the defendant did unlawfully do the things which they found him to have done.

The solution of this question depends upon the meaning of the word "unlawfully" in s. 55. If it means "with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. If it only means "without lawful excuse" or justification, then a further question arises, viz., whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offence, by reason, merely, that he *bona fide* and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to the abduction of girls under sixteen, 4 & 5 Phil. & Mary, c. 8, s. 2, and the general course of the decisions upon those enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully," in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse," using those words as equivalent to "without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist."

Cases may easily be suggested where such a defence might be made out, as, for instance, if it were proved that he had the authority of a Court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child, or school-mistress, or other custodian, and requiring forcible interference by way of protection.

In the present case the jury find that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father, as her guardian by nature: see Co. Litt. 88, b, n. 12, 19th ed., recognized in Reg. *v.* Howes, 3 E. & E. 332. Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will, whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz., in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done, within the meaning of the clause. In other words, having knowingly done a wrongful act, viz., in taking the girl away from the lawful possession of her father against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature: He had wrongfully and knowingly violated the father's rights against the father's will. And he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing. *Conviction affirmed.*

REYNOLDS *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1878.

[*Reported* 98 *United States*, 145.]

ERROR to the Supreme Court of the Territory of Utah.

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy in violation of sect. 5352 of the Revised Statutes.[1]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief, and belief only.[1]

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[1] Part only of the case, relating to the question of intent, is here given.

UNITED STATES *v.* HARMON.

United States District Court, Dist. of Kansas. 1891.

[*Reported* 45 *Federal Reporter*, 414.]

Philips, J.[2] Reduced to its actual essence, the ultimate position of defendant is this: That although the language employed in the given article may be obscene, as heretofore defined, yet as it was a necessary vehicle to convey to the popular mind the aggravation of the abuses in sexual commerce inveighed against, and the object of the publisher being to correct the evil and thereby alleviate human condition, the author should be deemed a public benefactor, rather than a malefactor. In short, the proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage, and incontinence might run riot; and it is not extravagant to predict that the success of such philosophy would remit us to that barbaric condition where

> "No common weal the human tribe allied,
> Bound by no law, by no fixed morals tied,
> Each snatched the booty which his fortune brought,
> And wise in instinct each his welfare sought."

Guiteau stoutly maintained to the end his sanity, and that he felt he had a patriotic mission to fulfil in taking off President Garfield, to the salvation of a political party. The Hindu mother cast her babe to the advouring Ganges to appease the gods. But civilized society says both are murderers. The Mormon contends that his religion teaches polygamy; and there is a school of so-called "modern thinkers" who would abolish monogamy, and erect on the ruins the flagrant doctrine of promiscuity, under the disguise of the affinities. All these claim liberty of conscience and thought as the basis of their dogmas, and the *pro bono publico* as the strength of their claim to indulgence. The law against adultery itself would lie dormant if the libertine could get the courts to declare and the jury in obedience thereto to say that if he invaded the sanctuary of conjugal life under the belief that the improvement of the human race demanded it he was not amenable to the statute. Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community; and he consents to all the motto implies, *salus populi suprema est lex;* and, as no government can exist without law, the law-making power, within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself. The responsibility for this statute rests upon Congress. The duty of the courts is imperative to enforce it while it stands.

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[1] *Acc.* State *v.* White, 64 N. H. 48, 5 Atl. 828. — Ed.

[2] Part of the opinion only is given. The case was an indictment for depositing an obscene publication in the United States post-office in violation of the provisions of section 3893 of the Revised Statutes of the United States. The defendant attempted to justify his act on the ground that he was actuated solely by the desire to improve sexual habits, and thus benefit the human race. — Ed.

ANONYMOUS.

Reporters' Note. 1498.

[*Reported Year-Book*, 13 *Hen. VII.* 14, *pl.* 5.]

Hussey said that a question had been put to him, which was this: A clerk of a church being in a chamber struck another with the keys of the church; which with the force of the blow flew out of his hand and through a window, and put out the eye of a woman. The question was, whether it should be called maihem or not. And it seems that it was, because he had a bad intent at the beginning; but it should be well considered in assessing the damages.

REX v. BLACKHAM.

CROWN CASE RESERVED. 1787.

[*Reported 2 East, Pleas of the Crown*, 711.]

BLACKHAM assaulted a woman with intent to commit a rape, and she without any demand from him offered him money, which the prisoner took and put into his pocket, but continued to treat her with violence to effect his original purpose till he was interrupted by the approach of another person. This was holden to be robbery by a considerable majority of the judges; for the woman, from violence and terror occasioned by the prisoner's behavior, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and the prisoner, by taking it, derived that advantage to himself from his felonious conduct; though his original intent were to commit a rape.

REGINA v. BRUCE.

CENTRAL CRIMINAL COURT. 1847.

[*Reported 2 Cox C. C.* 262.]

THE prisoner was indicted for manslaughter, under the circumstances detailed by one of the witnesses. He said the prisoner came into his master's shop, and pulled him by the hair off a cask where he was sitting, and shoved him to the door, and from the door back to the counter. That the prisoner then put his arm round his neck and spun him round, and they came together out of the shop; the prisoner kept "hold of the witness when they were outside, and kept spinning him round; the latter broke away from him, and, in consequence and at the moment of his so doing, he (the prisoner) reeled out into the road and knocked against a woman who was passing and knocked her down. The prisoner was very drunk, and staggered as he walked."

The woman so knocked down died shortly afterwards of the injuries she had received, and it was for having caused her death that the prisoner was indicted.

Mr. Justice ERLE inquired of the witness (a young lad) whether he resisted the prisoner during the transaction. The lad answered that he did not; he thought the prisoner was only playing with him, and was sure that it was intended as a joke throughout.

ERLE, J. (to the jury). I think, upon this evidence, you must acquit the prisoner. Where the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had his treatment of the boy been against the will of the latter, the prisoner would have been committing an assault — an unlawful act — which would have rendered him amenable to the law for any consequences resulting from it; but as every thing that was done was with the witness's consent, there was no assault, and consequently no illegality. It is, in the eye of the law, an accident, and nothing more.

REGINA *v.* FRANKLIN.

SUSSEX ASSIZES. 1883.

[*Reported* 15 *Cox C.C.* 163]

CHARLES HARRIS FRANKLIN was indicted before FIELD, J., at Lewes, for the manslaughter of Craven Patrick Trenchard.

The facts were as follows:

On the morning of the 25th day of July, 1882, the deceased was bathing in the sea from the West Pier, at Brighton, and swimming in the deep water around it. The prisoner took up a good sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased, C. P. Trenchard, who was at that moment swimming underneath, and so caused his death.

Gore, for the prosecution, urged that it would, apart from the question of negligence, be sufficient to constitute the offence of manslaughter, that the act done by the prisoner was an unlawful act, which the facts clearly showed it to be, and cited the case of Rex *v.* Fenton, 1 Lewin's Cr. Cas. 179. This case is referred to in 1 Russell on Crimes, 638: "If death ensues in consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is manslaughter. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding, and that in consequence of the scaffolding being so broken a corf in which the deceased was descending the mine struck against a beam on which the scaffolding had been supported, and by such striking the corf was overturned and the deceased precipitated into the mine and killed. Tindal, C. J., said: If death ensues as the consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question, therefore, is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act. If it followed from such wrongful act. as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."

Field, J. This is a question of great importance, for if I must follow the ruling of the very learned judge in Reg. *v.* Fenton (*ubi supra*) it will be necessary to go into the question whether the prisoner was guilty of negligence. I will consult my brother Mathew upon the point.

Field, J., after a short interval, returned into court and said: I am of opinion that the case must go to the jury upon the broad ground of negligence, and not upon the narrow ground proposed by the learned counsel, because it seems to me — and I may say that in this view my brother Mathew agrees — that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have a great abhorrence of constructive crime. We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and, therefore, the civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter. I do not think that the facts of this case bring it clearly within the principle laid down by Tindal, C. J., in Reg. *v.* Fenton. If I thought this case was in principle like that case I would, if requested, state a case for the opinion of the Court of Criminal Appeal. But I do not think so.

It was not disputed that the prisoner threw the box over the pier, that the box fell upon the boy, and the death of the boy was caused by the box falling upon him.

Gill, for the prisoner, relied upon the point that there was not proved such negligence as was criminal negligence on the part of the prisoner.

Field, J., in summing up the case to the jury. went carefully through the evidence, pointing out how the facts as admitted and proved affected the prisoner upon the legal question as he had explained it to them.

The jury returned a verdict of guilty of manslaughter. *Guilty*

The prisoner was sentenced to two months' imprisonment.

COMMONWEALTH *v.* ADAMS.

Supreme Judicial Court of Massachusetts. 1873.

[*Reported* 114 *Massachusetts*, 323.]

Complaint for assault and battery.

At the trial in the Superior Court, before Bacon, J., it appeared that the defendant was driving in a sleigh down Beacon Street, and was approaching the intersection of Charles Street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing, he ran against and knocked down a boy who was crossing Beacon Street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The Commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

A. Russ, for the defendant.

C. R. Train, Attorney-General, for the Commonwealth.

Endicott, J. We are of opinion that the ruling in this case cannot be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise. 1 Hale P. C. 39; Foster C. L. 259. Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev. § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done wilfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. The King *v.* Sainsbury, 4 T. R. 451. 457. It was held in Commonwealth *v.* Worcester, 3 Pick. 462. that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Waite, 11 Allen, 264. It is therefore immaterial whether a party violates the ordinance wilfully or not. The offence consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a *New trial granted.*

STATE *v.* HORTON.

SUPREME COURT OF NORTH CAROLINA. 1905.

[*Reported* 139 *N. C.* 588.]

INDICTMENT for manslaughter against W. P. Horton, heard by Judge W. B. COUNCILL and a jury, at April Term, 1905, of the Superior Court of Franklin County. The jury rendered a special verdict, and such verdict and proceedings thereon are as follows:

"That in the month of November, 1904, to-wit: on the —— day thereof, the defendant, W. P. Horton; was hunting turkeys on the lands of another; that the following local statute, enacted by the General Assembly of 1901, was in force at and in the place in which said defendant was hunting, to-wit: chapter 410 of the Laws of 1901; that the said Horton at the time he was so hunting, had not the written consent of the owner of said land, or of his lawful agent; that while so engaged in hunting he killed Charlie Hunt, the deceased, but that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting or of handling the firearm with which the killing was done; that hunting at that season was not forbidden under the general game law of the State, but was prohibited only by the special statute referred to; that the shooting from which the killing resulted was not done in such grossly careless or negligent manner as to imply any moral turpitude, or to indicate any indifference to the safeguarding of human life; that, but for the said statute herein incorporated, the killing of the deceased by defendant does not constitute any violation of the law. If upon the above findings of fact, the court should be of opinion that the defendant is guilty of manslaughter, we for our verdict find the defendant guilty of manslaughter, but if the court should be of opinion that the defendant is not guilty, we for our verdict find that the defendant is not guilty." Upon this special finding, the court being of opinion that the defendant was guilty of manslaughter, so adjudged and ordered a verdict of guilty of manslaughter to be entered, and gave judgment that the defendant be imprisoned in the county jail of Franklin, for a period of four months. Defendant excepted to the ruling of the court, and appealed from the judgment against him.

HOKE, J., after stating the case: It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence, and rests the guilt or innocence of the defendant on the fact alone that at the time of the homicide the defendant was hunting on another's land without written permission from the owner. The act which applies only in the counties of Orange, Franklin, and Scotland, makes the conduct a misdemeanor, and imposes a punishment on conviction, of not less than five nor more than ten dollars.

The statement sometimes appears in works of approved excellence to the effect that an unintentional homicide is a criminal offence when occasioned by a person engaged at the time in an unlawful act. In nearly every instance, however, will be found the qualification that if the act in question is free from negligence, and not in itself of dangerous tendency, and the criminality must arise, if at all, entirely from the fact that it is unlawful, in such case, the unlawful act must be one that is *malum in se* and not merely *malum prohibitum*, and this we hold to be the correct doctrine. In Foster's Crown Law, it is thus stated at page 258: "In order to bring a case within this description (excusable homicide) the act upon which death ensueth must be lawful. For if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intent, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter." At page 259, the same author puts an instance with his comments thereon as follows: "A shooteth at the poultry of B and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensued was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

One of these disqualifying statutes here referred to as an instance of *malum prohibitum* was an act passed (13 Richard II, chap. 13) to prevent certain classes of persons from keeping dogs, nets, or engines to destroy game, etc., and the punishment imposed on conviction was one year's imprisonment. There were others imposing a lesser penalty.

Bishop, in his work, entitled New Criminal Law, vol. 1, sec. 332, treats of the matter as follows: "In these cases of an unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is *malum in se* and not merely *malum prohibitum*." Thus Archbold says: "When a man in the execution of one act, by misfortune of chance and not designedly, does another act for which, if he had wilfully committed it, he would be liable to be punished — in that case, if the act he were doing were lawful or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance, but if it be *malum in se*, it is otherwise. To illustrate: since it is *malum prohibitum*, not *malum in se*, for an unauthorized person to kill game in England contrary to the statutes, if, in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized. But to shoot at another's fowls, wantonly or in sport, an act which is *malum in se*, though a civil trespass, and thereby accidentally to kill a human being is manslaughter. If the intent in the shooting were to commit larceny of the fowls, we have seen that it would be murder." To same effect is Estelle *v.* State, 21 N. J. Law, 182; Com. *v.* Adams, 114 Mass. 323.

An offence *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute. For the reason that acts *mala in se* have, as a rule, become criminal offences by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal, but this is not at all the test. An act can be, and frequently is, *malum in se*, when it amounts only to a civil trespass, provided it has a malicious element or manifests an evil nature, or wrongful disposition to harm or injure another in his person or property. Bishop Cr. Law, *supra;* Com. *v.* Adams, *supra.*

The distinction between the two classes of acts is well stated in 19 Am. & Eng. Enc. (2nd ed.), at p. 705: "An offence *malum in se* is one which is naturally evil, as murder, theft, and the like. Offences at common law are generally *malum in se.* An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of being forbidden."

We do not hesitate to declare that the offence of the defendant in hunting on the land without written permission of the owner was *malum prohibitum*, and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide, and the defendant should be declared not guilty.

We are referred by the Attorney-General to East's Pleas of the Crown, and Hale's Pleas of the Crown, as authorities against this position. We would be slow indeed to hold that the law differed from what these eminent authors declared it to be in their day and time, nor are we required to do so, for a careful examination of their writings will, we think, confirm the views expressed by the court. My Lord Hale does say in volume 1, p. 39, that "If a man do *ex intentione* an unlawful act, tending to the bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck, follow thereby within the year and day; or if he strike at one and missing him kill another whom he did not intend, this is felony and homicide, and not casualty or *per infortunium.*" "So it is, if he be doing an unlawful act though not intending bodily harm to any person, as throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide, and not *per infortunium*, for the act was voluntary, though the event was not intended, and therefore the act itself being unlawful, he is criminally guilty of the consequence that follows."

But this author says in treating of the same subject, at pp. 475, 476: "So if A throws a stone at a bird, and the stone striketh and killeth another to whom he intended no harm, it is *per infortunium*, but if he had thrown the stone to kill the poultry or cattle of B, and the stone hits and kills a bystander, it is manslaughter because the act was unlawful: but not murder because he did not maliciously or with intent to hurt the bystander. . . . By the statute of 33 Henry VIII, chap. 6, no person not having lands, etc., of the yearly value of one hundred pounds per annum may keep or shoot a gun, upon pain of forfeiture of ten pounds. Suppose, therefore, such a person, not qualified, shoot with a gun at a bird or at crows, and by mischance it kills a bystander, by the breaking of the gun or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him; for though the statute prohibits him to keep or shoot a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature."

Mr. East, while he gives an instance which apparently supports the view of the State, in treating further on the subject in volume 1, p. 255, says: "Homicide in the prosecution of some act or purpose criminal or unlawful in itself, wherein death ensues collaterally to or beside the principal intent; I say collaterally to or beside the principal intent in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another. And first, it is principally to be observed that if the act on which death ensued be *malum in se*, it will be murder or manslaughter according to the circumstances; if done in the prosecution of a felonious intent, however, the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A shoots at the poultry of B, and by accident kills a man; if his intent were to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it were done wantonly and without that intent, it will be barely manslaughter. A whips a horse on which B is riding, whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A and misadventure in B." And again, at page 257: "So if one be doing an unlawful act, though not intending bodily harm to any person, as throwing at another's horse, if it hit a person and kill him, it is manslaughter. Yet in each case it seems that the guilt would rather depend on one or other of these circumstances; either that the act might probably breed danger or that it was done with a mischievous intent."

So we have it, that both Sir Matthew Hale and Mr. East, to whom we were referred as supporting the claim of guilt, declared that the act must be *malum in se*, and the instances given by them show that these writers had this qualification in mind whenever they state the doctrine in more general terms.

Sir William Blackstone also says in volume 4, pp. 192, 193: "And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in prosecution of a felonious intent, or its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will be manslaughter" — citing Foster's Criminal Law. We take it that the distinguished commentator must have intended only such civil trespasses as involve an element *malum in se*, as he cites Foster's Criminal Law, and this author, as we have seen, states the qualification suggested.

Again, we are cited by the State to an instance put by East at p. 269: "But though the weapons be of a dangerous nature yet if they be not directed by the person using them against each other, and so no danger to be reasonably apprehended, and if death casually ensue, it is but manslaughter; as if persons be shooting at game, or butts, or any other lawful object, and a bystander be killed. And it makes no difference with respect to game whether the party be qualified or not, but if the act be unlawful in itself, as shooting at deer in another's park without leave, though in sport and without any felonious intent, whereby a bystander is killed, it will be manslaughter; but if the owner had given leave or the party had been shooting in his own park, it would only have been misadventure." Lord Hale, at page 475, gives the same instance. And it is urged that this instance is exactly similar to the one before us, but not so.

According to Sir William Blackstone, in his Commentaries, book 2, p. 415: "For sometime prior to the Norman Conquest, every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests, as is fully expressed in the laws of Canute and Edward the Confessor. *Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum.*" And further on it is said: "That if a man shoots game on another's private ground and kills it there, the property belongs to him on whose ground it was killed. The property arising *ratione soli*. . . . On the Norman Conquest, a new doctrine took place, and the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorized under him." Again: "But if the king reserve to himself the forests for his own exclusive diversion, so he granted from time to time other tracts of land to his subjects under the name of chases or parks, or gave them license to make such in their own parks. And, by the common law, no one is at liberty to take or kill any beast of chase but such as hath an ancient chase or park." In Enc. Britannica we read that the chases or parks were much the same, except that the parks were enclosed, having a tendency to make the game contained therein more completely and exclusively the property of the owner. Anyone who entered them was a trespasser, and in shooting the game therein, his act can be likened to that of the case put by Foster, East, and Lord Hale, where one wantonly shot another's chicken. He was engaged in the effort to destroy another's property, and the act could well be considered *malum in se.* But not so here. We have never transplanted to this country either the Saxon or Norman theory as to the right to take and appropriate game. Here, it is considered the property of the captor, except perhaps in the case of bees.

It is said in Cooley on Torts: "As regards beasts of chase, the English law is that if a hunter shoots and captures a beast on the land of another, the property is in him as in the owner of the land. Under the civil law, the property passed to the captor. And such is believed to be the recognized rule in America, even where the capture has been effected by means of a trespass on another's land." State *v.* House, 65 N. C. 315.

The act of the defendant, therefore, was not in the effort to destroy another's property, but was strictly *malum prohibitum.* State *v.* Vines, 93 N. C. 493, and State *v.* Dorsey, 118 Ind. 167, are cases apparently opposed to our present decision, but neither is really so. In State *v.* Vines the sport was imminently dangerous, amounting to recklessness; and in State *v.* Dorsey the element of criminal negligence was also present, and in this case a State statute governing the construction was given much weight. Neither the one case nor the other required any critical examination of the doctrine as sometimes stated, that an unintentional homicide, occasioned when in the commission of an unlawful act, is manslaughter. The verdict in the case before us negatives both the elements of guilt (present in these two cases), declaring that the act was not in itself dangerous and that the defendant was not negligent.

Again, it has been called to our attention that courts of the highest authority have declared that the distinction between *malum prohibitum* and *malum in se* is unsound, and has now entirely disappeared. Our own court so held in Sharp *v.* Farmer, 20 N. C. 255, and decisions to the same effect have been made several times since. Said Ruffin, C. J., in Sharp *v.* Farmer: "The distinction between an act *malum in se* and one *malum prohibitum* was never sound and is entirely disregarded, for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law." It will be noted that this decision was on a case involving the validity of a contract, and the principle there established is undoubtedly correct. The fact, however, that the judge who delivered the opinion uses the words "was never sound," and that other opinions to the same effect use the words "has disappeared," shows that the distinction has existed; and it existed too at a time when this feature in the law of homicide was established. And we are well assured that because the courts, in administering the law on the civil side of the docket, have come to the conclusion that a principle once established is unsound and should be rejected, this should not have the effect of changing the character of an act from innocence to guilt, which had its status fixed when the distinction was recognized and enforced.

It was further suggested that the homicide was one of the very results which the statute was designed to prevent, and to excuse the defendant would be contrary to the policy of the act. But this can hardly be seriously maintained. It will be noted that it was not the owner of the land who was killed, but the defendant's comrade in the hunt; and of a certainty, if our Legislature thought that conduct like that of the defendant was dangerous and the statute was designed to protect human life, some other penalty would have been imposed than a fine of "not less than five dollars and not more than ten." It is more reasonable to conclude that the act in its purpose was designed to prevent and suppress petty trespasses and annoyances, such as leaving open gates, throwing down fences, treading over crops, etc.

The special verdict having established that the act of the defendant was entirely accidental, it is a relief that we can declare him innocent in accordance with accepted doctrine, and that in the case at bar the law can be administered in mercy as well as justice. Quoting again from that eminent judge and humane and enlightened man, Sir Michael Foster: "And where the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of the judges to be perpetually hunting after forfeitures, where the heart is free from guilt. They are ministers appointed by the Crown for the ends of public justice, and should have written on their hearts the solemn engagement His Majesty is under to cause law and justice in mercy to be executed in all his judgments." We know that in this spirit the judge below dealt with the defendant and his cause; for though the judgment of His Honor impelled him to the conclusion of guilt, he imposed the lightest punishment permissible for the offence.

There was error in holding the defendant guilty, and, on the facts declared, a verdict of not guilty should be directed and the defendant discharged.

Reversed.

WALKER, J., concurs in result only.

COMMONWEALTH *v.* MINK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1877.

[*Reported* 123 *Massachusetts*, 422.]

INDICTMENT for the murder of Charles Ricker at Lowell, in the county of Middlesex, on August 31, 1876. Trial before AMES and MORTON, JJ., who allowed a bill of exceptions in substance as follows: —

It was proved that Charles Ricker came to his death by a shot from a pistol in the hand of the defendant. The defendant introduced evidence tending to show that she had been engaged to be married to Ricker; that an interview was had between them at her room, in the course of which he expressed his intention to break off the engagement and abandon her entirely; that she thereupon went to her trunk, took a pistol from it, and attempted to use it upon herself, with the intention of taking her own life; that Ricker then seized her to prevent her from accomplishing that purpose, and a struggle ensued between them; and that in the struggle the pistol was accidentally discharged, and in that way the fatal wound inflicted upon him.

The jury were instructed on this point as follows: "If you believe the defendant's story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act, and that which she had no right to do. It is true, undoubtedly, that suicide cannot be punished by any proceeding of the courts, for the reason that the person who kills himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide is also criminal. It would be the duty of any bystander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is, that if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the person about to do it had in his mind, it would be an unlawful killing, and the person would incur the responsibility which attaches to the crime of manslaughter.

"Then you are to inquire, among other things, and if you reach that part of the case, Did this woman attempt to commit suicide in the presence of Ricker? and, if she did, I shall have to instruct you that he would have a right to interfere and try to prevent it by force. He would have a perfect right, and I think I might go further and say that it would be his duty, to take the pistol away from her if he possibly could, and to use force for that purpose. If then, in the course of the struggle on his part to get possession of the pistol to prevent the person from committing suicide, the pistol went off accidentally, and he lost his life in that way, it would be a case of manslaughter, and it would not be one of those accidents which would excuse the defendant from being held criminally accountable.

"Did she get into such a condition of despondency and disappointment that she was trying to commit suicide, and was about to do so? If that was her condition, if she was making that attempt, and he interfered to prevent it and got injured by an accidental discharge of the pistol, it would be manslaughter." The jury returned a verdict of guilty of manslaughter; and the defendant alleged exceptions.

GRAY, C. J.[1] The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority. By the common law of England, suicide was considered a crime against the laws of God and man, the lands and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se.* Hales *v.* Petit, Plowd. 253, 261; 3 Inst. 54; 1 Hale P. C. 411–417; 2 Hale P. C. 62; 1 Hawk. c. 27; 4 Bl. Com. 95, 189, 190. "He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head." 1 Hawk. c. 27, s. 6. One who persuades another to kill himself, and is present when he does so, is guilty of murder as a principal in the second degree; and if two mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of the murder of the one who dies. Bac. Max. reg. 15; Rex *v.* Dyson, Russ. & Ry. 523; Regina *v.* Alison, 8 Car. & P. 418. One who encourages another to commit suicide, but is not present at the act which causes the death, is an accessory before the fact, and at common law escaped punishment only because his principal could not be first tried and convicted. Russell's case, 1 Moody, 356; Regina *v.* Leddington, 9 Car. & P. 79. And an attempt to commit suicide is held in England to be punishable as a misdemeanor. Regina *v.* Doody, 6 Cox C. C. 463; Regina *v.* Burgess, Leigh & Cave, 258; s. c. 9 Cox C. C. 247.

Suicide has not ceased to be unlawful and criminal in this Commonwealth by the simple repeal of the Colony Act of 1660 by the St. of 1823, c. 143, which (like the corresponding St. of 4 G. IV. c. 52, enacted by the British Parliament within a year before) may well have had its origin in consideration for the feelings of innocent surviving relatives; nor by the briefer directions as to the form of coroner's inquests in the Rev. Sts. c. 140, s. 8, and the Gen. Sts. c. 175, s. 9, which in this, as in most other matters, have not repeated at length the forms of legal proceedings set forth in the statutes codified; nor by the fact that the Legislature, having in the general revisions of the statutes measured the degree of punishment for attempts to commit offences by the punishment prescribed for each offence if actually committed, has, intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner. Rev. Sts. c. 133, s 12; Gen. Sts. c. 168, s. 8; Commonwealth *v.* Dennis.

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[1] Arguments of counsel and part of the opinion are omitted.

105 Mass. 162. After all these changes in the statutes, the point decided in Bowen's case was ruled in the same way by Chief Justice Bigelow and Justices Dewey, Metcalf, and Chapman, in a case which has not been reported. Commonwealth *v.* Pratt, Berkshire, 1862.

Since it has been provided by statute that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered," it may well be that suicide is not technically a felony in this Commonwealth. Gen. Sts. c. 168, s. 1; St. 1852, c. 37, s. 1. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. IV. 45, pl. 10; Marler *v.* Ayliffe, Cro. Jac. 134; 2 Rol. Ab. 559; 1 Hawk. c. 60, s. 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter.

The only doubt that we have entertained in this case is, whether the act of the defendant, in attempting to kill herself, was not so malicious, in the legal sense, as to make the killing of another person, in the attempt to carry out her purpose, murder, and whether the instructions given to the jury were not therefore too favorable to the defendant.

Exceptions overruled.

SECTION III.

The mens rea:

Negligence.

Foster, Crown Law, 262. It is not sufficient that the act upon which death ensueth be lawful or innocent, it must be done in a proper manner and with due caution to prevent mischief. Parents, master, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensueth without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances of the case. If with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder.

This rule touching due caution ought to be well considered by all persons following their lawful occupations, especially such from whence danger may probably arise.

Workmen throw stones, rubbish, or other things from an house in the ordinary course of their business, by which a person underneath happeneth to be killed. If they look out and give timely warning beforehand to those below, it will be accidental death. If without such caution, it will amount to manslaughter at least. It was a lawful act, but done in an improper manner.

. . . .

I need not state more cases by way of illustration under this head; these are sufficient. But I cannot pass over one reported by Kelyng (Kel. 41), because I think it an extremely hard case, and of very extensive influence. A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer; he carried it home and showed it to his wife; and she standing before him he pulled up the cock, and touched the trigger. The pistol went off and killed the woman. This was ruled manslaughter.

It appeareth that the learned editor[1] was not satisfied with the judgment. It is one of the points he in the preface to the report recommendeth to farther consideration.

Admitting that the judgment was strictly legal, it was, to say no better of it, *summum jus.*

. . . .

The law in these cases doth not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken. In the case just mentioned of workmen throwing rubbish from buildings, the ordinary caution of looking out and giving warning by outcry from above will excuse, though doubtless a better and more effectual warning might have been given. But this excuseth, because it is what is usually given, and hath been found by long experience, in the ordinary course of things, to answer the end. The man in the case under consideration examined the pistol in the common way; perhaps the rammer, which he had not tried before, was too short and deceived him. But having used the ordinary caution, found to have been effectual in the like cases, he ought to have been excused.

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[1] Chief Justice Holt.

I have been the longer upon this case, because accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall among the nearest friends and relations; and in such a case the forfeiture of goods, rigorously exacted, would be heaping affliction upon the head of the afflicted, and galling an heart already wounded past cure. It would even aggravate the loss of a brother, a parent, a child, or wife, if such a loss under such circumstances is capable of aggravation.

I once upon the circuit tried a man for the death of his wife by the like accident. Upon a Sunday morning the man and his wife went a mile or two from home with some neighbors to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He taking it up touched the trigger, and the gun went off and killed his wife, whom he dearly loved. It came out in evidence that, while the man was at church, a person belonging to the family privately took the gun, charged it and went after some game; but before the service at church was ended returned it loaded to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance as he left it. I did not inquire whether the poor man had examined the gun before he carried it home; but being of opinion upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion they should acquit him. And he was acquitted.

REGINA *v.* CHAMBERLAIN.

HERTFORD ASSIZES. 1867.

[*Reported* 10 *Cox C. C.* 486.]

INDICTMENT for manslaughter.

The prisoner had resided for many years in Hertford, carrying on the business of a herbalist, and he was also what was called a "quack doctor." The deceased woman had for some years a tumor on her shoulder, and in March, 1866, she consulted the prisoner, who gave her first a mercurial ointment, to which no objection was taken. After this, however, it was said he gave her a different ointment, which was arsenical, and this it was suggested had caused her death by being absorbed into the system. The case for the prosecution was that she became worse after she used this ointment, that is to say, in August, 1866; that she suffered from arsenical symptoms; and that her death, which happened in September, was owing to this cause. It was not disputed that she died with the symptoms of arsenic, nor that there was arsenic in the ointment she used; the real question in the case was whether there was "culpable negligence" on the part of the prisoner in giving it without due precautions. That being the question in the case, it turned a good deal upon the medical evidence as to the use of arsenic in ointments. As to this Dr. Taylor admitted that it was used upon the Continent, and that it had been used in this country until within the last thirty years, when he said it was discovered that it was absorbed into the system, and it was discontinued in this country, though it still was used upon the Continent. The foreign practitioners, he said, were a little more given to a bold system in cases apparently hopeless, and a little more disposed to what he called "heroic" treatment — that is to say, treatment in which the medical practitioner for the sake of the patient runs some risk — than our English practitioners, who, he intimated, were rather more cautious in such cases. Another point on which the case turned was as to the prisoner not having warned the deceased of the necessary effect of the arsenic when absorbed into the system. It did not appear that he had given any particular directions beyond telling her to "rub some of the ointment in;" and the woman, naturally thinking that the more she rubbed the better, had rubbed and rubbed until she had absorbed so much of the poison that she died; and the prisoner had sold her another box without, as it appeared, making any observation as to the effect of the first.

Parry, Serjt., for the prisoner, contended that it was a case of a mere blunder or error, and not a case of negligence so culpable as to be criminal.

Blackburn, J., to the jury. If the prisoner by culpable negligence had caused the death of the deceased woman, he was guilty of manslaughter; but the mere fact that death had occurred through mistake or misfortune would not be enough, or no medical man would be safe. There must, however, be competent knowledge and care in dealing with a dangerous drug, and if the man either was ignorant of the nature of the drug he used or was guilty of gross want of care in its use, there would be criminal culpability. In the one case there would be culpable rashness in using so dangerous a drug in ignorance of its operation; in the other case there would be culpable want of care or culpable carelessness in the use of the drug; and in either case that would be culpable and criminal negligence, which would justify a conviction, supposing the jury were satisfied that the death arose from the arsenic. The first question was, whether the death was caused by the arsenic administered by the prisoner; upon which, however, he thought the evidence very strong. The real question would be whether there was culpable negligence, which resolved itself into the two questions he had explained. He could not define the nature of "culpable negligence" otherwise than as he had described it. It was a question for the jury, for it was a question of degree. It was a question of more or less, and it could not be defined. All the direction he could give them was that if the prisoner administered the arsenic without knowing or taking the pains to find out what its effect would be, or if knowing this, he gave it to the patient to be used without giving her adequate directions as to its use, there would in either view of the case be culpable negligence, and the prisoner ought to be convicted: but if otherwise, there would not be such negligence, and the prisoner ought to be acquitted. The most serious part of the case was in the apparent absence of caution or directions to the woman as to the use of the arsenical ointment, the effect of which, as was well known, was that it would be absorbed into the system so as to cause death. It was said that foreign doctors used it, but if so it might be presumed that they watched its use with care. It appeared to him that a medical man who should administer such a drug or allow a patient to apply it without taking any care to observe its effects or guard against them, would be gravely wanting in due care. Whether under the circumstances it amounted to culpable negligence was, he repeated, for the jury. *Not guilty.*[1]

REGINA v. SALMON.

Crown Case Reserved. 1880.

[*Reported* 14 *Cox C. C.* 494.]

Case reserved for the opinion of this court by Lord Coleridge, C. J., at the Summer Assizes at Wells, 1880.

The three prisoners were tried for the manslaughter of William Wells, a little boy of ten years old. The prisoners went into a field, and each fired a shot from a rifle at a target. One of the shots killed the deceased, who was at the time in a tree in his father's garden, distant about four hundred yards from the spot where the shot was fired. The rifle was sighted for nine hundred and fifty yards, and would probably be deadly at a mile. It did not appear which one of the prisoners fired the fatal shot.[2]

No counsel appeared to argue on behalf of the prisoners.

Norris for the prosecution. The prisoner who fired the fatal shot was clearly guilty of manslaughter, but the evidence of his identity not being clear, the rule that all persons engaged in a common enterprise are jointly liable will apply. All the prisoners went into the field for a common purpose, rifle practice; and it was their duty to take all proper precautions to prevent any danger to other persons. The plan attached to the case shows that they fired across three highways, and that they were firing too near to the neighboring gardens, in one of which the deceased boy was.

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[1] *Acc.* Reg *v.* Macleod, 12 Cox C. C. 534; State *v.* Hardister, 38 Ark. 605. — Ed.

[2] This statement of the case is condensed from the report of Lord Coleridge. — Ed.

Lord Coleridge, C. J. I am of opinion that the conviction was right and ought to be affirmed. If a person does a thing which in itself is dangerous, and without taking proper precautions to prevent danger arising, and if he so does it and kills a person, it is a criminal act as against that person. That would make it clearly manslaughter as regards the prisoner whose shot killed the boy. It follows as the result of the culpable negligence of this one, that each of the prisoners is answerable for the acts of the others, they all being engaged in one common pursuit.

Field, J. I am of the same opinion. At first I thought it was necessary to show some duty on the part of the prisoners as regards the boy, but I am now satisfied that there was a duty on the part of the prisoners towards the public generally not to use an instrument likely to cause death without taking due and proper precautions to prevent injury to the public. Looking at the character of the spot where the firing took place, there was sufficient evidence that all three prisoners were guilty of culpable negligence under the circumstances.

Lopes, J., concurred.

Stephen, J. I am of opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of every one to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger.

Watkin Williams, J., concurred. *Conviction affirmed.*

REGINA *v.* NICHOLLS.

Stafford Assizes. 1875.

[*Reported* 13 *Cox C. C.* 75.]

Prisoner was indicted for the manslaughter of Charles Nicholls.

A. Young prosecuted.

The prisoner was the grandmother of the deceased, an infant of tender years, said to have died from the neglect of the prisoner to supply it with proper nourishment. She was a poor woman, and in order to earn her livelihood was out the greater part of the day. The deceased was the child of the prisoner's daughter. The daughter was dead, and therefore the prisoner took charge of the child, and while away from home left it to the sole care of a boy of nine years. The cause of death was emaciation, probably resulting from want of food.

The facts will be found more particularly stated in the summing up of the learned judge.

At the close of the case for the prosecution, BRETT, J., asked what was the neglect charged.

A. Young. Leaving the child in the sole custody of so young a boy during many hours of the day.

BRETT, J., to the jury. This woman is charged with manslaughter under somewhat peculiar circumstances. She was the grandmother of the deceased infant, and not bound by law to take care of it. She might have sent the child to the workhouse, but did not do so. If a grown up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without, at all events, *wicked* negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be wicked negligence, that is, negligence so great that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not. We must judge of all these things according to the state and condition of the persons concerned. Here was an old woman left in a difficult position. The child was probably illegitimate. Its mother, who was the prisoner's daughter, had died, and would not probably have suckled it for some days before her death. The child was small and weakly. It might, perhaps, have lived. What, however, was the prisoner to do? It is said that she had, through her own misconduct, fallen into bad circumstances; that she was addicted to drink, and that her furniture had been seized. She was out all day collecting rags and bones. What ought she to have done with respect to the child? The prosecution say that she ought to have sent it to the parish authorities. Perhaps she ought. But she, like others, might be full of prejudice, and dislike to send it there. So her omission to send it is not sufficient; for, as I have pointed out, there must be wicked negligence on her part. Then she must go out to work. She could not find any one else, for she had no means, so she got a son of nine years old to look to the infant. She may have been very careless, but the question is, was she wickedly careless? She was in fault, for she ought not to have been away so many hours at a time; and no doubt you will think that it was that that caused the death of the child. The boy was careless, but it appears that the old woman certainly did have food in the house. Suppose she told the boy to feed the baby, and left food wherewith to feed it? Still she would be careless, for she ought to have returned home to see that he did so. It is very right that this case should be inquired into, and that the neighbors should look into it, but nevertheless it is right that we should consider the circumstances of the prisoner in order to determine whether she has been guilty of such carelessness as I have defined.

Verdict, Not guilty.

COMMONWEALTH *v.* PIERCE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1884.

[*Reported* 138 *Mass.* 165.]

HOLMES, J. The defendant has been found guilty of manslaughter, on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court, and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have "so much knowledge or probable information of the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness, and not of an honest intent and expectation to cure." The seventh request assumes the law to be as thus stated. The sixth request was as follows: "If the defendant made the prescription with an honest purpose and intent to cure the deceased, he is not guilty of this offence, however gross his ignorance of the quality and tendency of the remedy prescribed, or of the nature of the disease, or of both." The eleventh request was substantially similar, except that it was confined to this indictment.

The court instructed the jury that "it is not necessary to show an evil intent;" that, "if by gross and reckless negligence he caused the death, he is guilty of culpable homicide;" that "the question is whether the kerosene (if it was the cause of the death), either in its original application, renewal, or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant;" and that the defendant was "to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it." In other words, that the defendant's duty was not enhanced by any express or implied contract, but that he was bound at his peril to do no grossly reckless act when, in the absence of any emergency or other exceptional circumstances, he intermeddled with the person of another.

The defendant relies on the case of Commonwealth *v.* Thompson, 6 Mass. 134, from which his fifth request is quoted in terms. His argument is based on another quotation from the same opinion: "To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now, there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription." This language is ambiguous, and we must begin by disposing of a doubt to which it might give rise. If it means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully, and latterly, we may add, much more willingly, recognized that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful for independent reasons, from which death accidentally ensues. 3 Inst. 57; 1 Hale P. C. 472–477; 1 Hawk. P. C., c. 29, §§ 3, 4, 12; c. 31, §§ 4–6; Foster, 262, 263 (Homicide, c. 1, § 4); 4 Bl. Com. 192, 197; 1 East P. C. 260, and *seq.;* Hull's case, Kelyng, 40, and cases cited below.

But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances, from which some one or everybody else might be led to anticipate or apprehend them if the supposed act were done. We have to determine whether recklessness in this sense was necessary to make the defendant guilty of felonious homicide, or whether his acts are to be judged by the external standard of what would be morally reckless, under the circumstances known to him, in a man of reasonable prudence.

More specifically, the questions raised by the foregoing requests and rulings are whether an actual good intent and the expectation of good results are an absolute justification of acts, however foolhardy they may be if judged by the external standard supposed, and whether the defendant's ignorance of the tendencies of kerosene administered as it was will excuse the administration of it.

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of Tindal, C. J., "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475; s. c. 4 Scott, 244.

If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all.

There is no denying, however, that Commonwealth *v.* Thompson, although possibly distinguishable from the present case upon the evidence, tends very strongly to limit criminal liability more narrowly than the instructions given. But it is to be observed that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord Hale, 1 P. C. 429, to the effect "that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or prevent a disease, and, contrary to the expectation of the physician, it kills him, he is not guilty of murder or manslaughter." 6 Mass. 141. If this portion of the charge to the jury is reported accurately, which seems uncertain (6 Mass. 134, n.), we think that the court fell into the mistake of taking Lord Hale too literally. Lord Hale himself admitted that other persons might make themselves liable by reckless conduct. 1 P. C. 472. We doubt if he meant to deny that a physician might do so, as well as any one else. He has not been so understood in later times. Rex *v.* Long, 4 C. & P. 423, 436; Webb's case, 2 Lewin, 196, 211. His text is simply an abridgment of 4 Inst. 251. Lord Coke there cites the Mirror, c. 4, § 16, with seeming approval, in favor of the liability. The case cited by Hale does not deny it. Fitz. Abr. Corone, pl. 163. Another case of the same reign seems to recognize it. Y. B. 43 Edw. III. 33, pl. 38, where Thorp said that he had seen one M. indicted for killing a man whom he had undertaken to cure, by want of care. And a multitude of modern cases have settled the law accordingly in England. Rex *v.* Williamson, 3 C. & P. 635; Tessymond's case, 1 Lewin, 169; Ferguson's case, 1 Lewin, 181; Rex *v.* Simpson, Willcock, Med. Prof., part 2, ccxxvii.; Rex *v.* Long, 4 C. & P. 398; Rex *v.* Long, 4 C. & P. 423; Rex *v.* Spiller, 5 C. & P. 333; Rex *v.* Senior, 1 Moody, 346; Webb's case, *ubi supra;* s. c. 1 Mood. & Rob. 405; Queen *v.* Spilling, 2 Mood. & Rob. 107; Regina *v.* Whitehead, 3 C. & K. 202; Regina *v.* Crick, 1 F. & F. 519; Regina *v.* Crook, 1 F. & F. 521; Regina *v.* Markuss, 4 F. & F. 356; Regina *v.* Chamberlain, 10 Cox C. C. 486; Regina *v.* Macleod, 12 Cox C. C. 534. See also Ann *v.* State, 11 Humph. 159; State *v.* Hardister, 38 Ark. 605; and the Massachusetts cases cited below.

If a physician is not less liable for reckless conduct than other people, it is clear, in the light of admitted principle and the later Massachusetts cases, that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor. The only difference is that the latter inquiry is still more obviously external to the estimate formed by the actor personally than the former. But it is familiar law that an act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder. Commonwealth *v.* Drew, 4 Mass. 391, 396; Commonwealth *v.* Fox, 7 Gray, 585. The doctrine is clearly stated in 1 East P. C. 262.

The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious.

As implied malice signifies the highest degree of danger, and makes the act murder; so, if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter, as in the case of an ordinary assault with feet and hands, or a weapon not deadly, upon a well person. Cases of Drew and Fox, *ubi supra.* Or firing a pistol into the highway, when it does not amount to murder. Rex *v.* Burton, 1 Stra. 481. Or slinging a cask over the highway in a customary, but insufficient mode. Rigmaidon's case, 1 Lewin, 180. See Hull's case, *ubi supra.* Or careless driving. Rex *v.* Timmins, 7 C. & P. 499; Regina *v.* Dalloway, 2 Cox C. C. 273; Regina *v.* Swindall, 2 C. & K. 230.

If the principle which has thus been established both for murder and manslaughter is adhered to, the defendant's intention to produce the opposite result from that which came to pass leaves him in the same position with regard to the present charge that he would have been in if he had had no intention at all in the matter. We think that the principle must be adhered to, where, as here, the assumption to act as a physician was uncalled for by any sudden emergency, and no exceptional circumstances are shown; and that we cannot recognize a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.

We have implied, however, in what we have said, and it is undoubtedly true, as a general proposition, that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown. And it may be asked why the dangerous character of kerosene, or "the fatal tendency of the prescription," as it was put in the fifth request, is not one of the circumstances the defendant's knowledge or ignorance of which might have a most important bearing on his guilt or innocence.

But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that, if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it, and who had no warning, would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. And therefore, again, if the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, which seems to have been the view of the common law with regard to bulls, for instance, a person to be made liable must have notice of some past experience, or, as is commonly said, "of the quality of his beast." 1 Hale P. C. 430. But if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril. When the jury are asked whether a stick of a certain size was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was. Commonwealth *v.* Drew, *ubi supra.* See also Commonwealth *v.* Webster, 5 Cush. 295, 306. So as to an assault and battery by the use of excessive force. Commonwealth *v.* Randall, 4 Gray, 36. So here. The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough. Commonwealth *v.* Stratton, 114 Mass. 303, 305. Indeed, if the defendant had known the fatal tendency of the prescription, he would have been perilously near the line of murder. Regina *v.* Packard, C. & M. 236. It will not be necessary to invoke the authority of those exceptional decisions in which it has been held, with regard to knowledge of the circumstances, as distinguished from foresight of the consequences of an act, that, when certain of the circumstances were known, the party was bound at his peril to inquire as to the others, although not of a nature to be necessarily inferred from what were known. Commonwealth *v.* Hallett, 183 Mass. 452; Regina *v.* Prince, L. R. 2 C. C. 154; Commonwealth *v.* Farren, 9 Allen, 489.

The remaining questions may be disposed of more shortly. When the defendant applied kerosene to the person of the deceased in a way which the jury have found to have been reckless, or, in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify by her consent, and which therefore was an assault notwithstanding that consent. Commonwealth *v.* Collberg, 119 Mass. 350. See Commonwealth *v.* Mink, 123 Mass. 422, 425. It is unnecessary to rely on the principle of Commonwealth *v.* Stratton, *ubi supra*, that fraud may destroy the effect of consent, although evidently the consent in this case was based on the express or implied representations of the defendant concerning his experience.

As we have intimated above, an allegation that the defendant knew of the deadly tendency of the kerosene was not only unnecessary, but improper. Regina *v.* Packard, *ubi supra.* An allegation that the kerosene was of a dangerous tendency is superfluous, although similar allegations are often inserted in indictments, it being enough to allege the assault, and that death did in fact result from it. It would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with exposure. See Commonwealth *v.* Macloon, 101 Mass. 1. See further the second count, for causing death by exposure, in Stockdale's case, 2 Lewin, 220; Regina *v.* Smith, 11 Cox C. C. 210. The instructions to the jury on the standard of skill by which the defendant was to be tried, stated above, were as favorable to him as he could ask.

The objection to evidence of the defendant's previous unfavorable experience of the use of kerosene is not pressed. The admission of it in rebuttal was a matter of discretion. Commonwealth *v.* Blair, 126 Mass. 40. *Exceptions overruled.*

JOHNSON *v.* STATE.

SUPREME COURT OF OHIO. 1902.

[*Reported* 66 *Ohio St.* 59.]

PRICE, J. If the conceded facts are sufficient and the charge of the trial court sound law to govern the jury in deciding on such facts, the plaintiff in error may have been properly punished for very reprehensible conduct. That part of the charge contained in the statement of the case as well as a subsequent paragraph which we will notice, were equivalent to directing a verdict of conviction, inasmuch as there was no dispute as to the facts. There was a verdict of conviction and a sentence upon the verdict, which the circuit court sustained, and thereby must have held that the charge correctly stated the law of the case.

The importance of what is presented as an apparently new doctrine in this state, as well as respect for the opinions of both the lower courts, have been sufficient reasons for giving the questions involved a careful consideration.

The indictment for manslaughter in this case is in the short form authorized by section 7217 of the Revised Statutes, and it charges that "Noah Johnson . . . on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and one, in the county of Scioto, did unlawfully kill one Emory Barrows then and there being, contrary to the form of the statute," etc.

Prior to the codification of the criminal statutes, manslaughter was thus defined: "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and on conviction thereof, be punished," etc. Vol. 1, S. & C. 403.

The statute on the subject now is section 6811, Revised Statutes, which reads: "Whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be imprisoned," etc. The preceding sections define murder in the first and second degrees. But the present section 9811 is not different in substance and meaning from the original section above quoted, and to ascertain the elements of the crime of manslaughter we look to the original as it stood before codification or revision. Therefore, to convict of manslaughter, it is incumbent upon the state to establish that the killing was done "either upon a sudden quarrel, or unintentionally while the slayer was (is) in the commission of some unlawful act."

It is clear from the facts and the instructions given the jury, that Barrows was not killed by Johnson in a quarrel; nor was the killing intentional. Hence, the latter clause of the definition of the crime is the one to which our investigation should be confined. The state was required to show that while the killing was unintentional, it was done by Johnson while he was in the commission of some unlawful act; and the question arises, whether the negligent act or acts of the slayer, though no breach of any law, may be sufficient to constitute the unlawful act designated in the statute. Or, is the state required to show that he was in the commission of an act prohibited by law?

At the time of this homicide there was even no ordinance of the village of Scioto regulating the speed or manner of riding bicycles upon its streets. None appears in the record, and we therefore assume there was no such ordinance. And it is not claimed that there was any statute then in force on that subject. What then is the proper construction of the clause "while in commission of some unlawful act"?

The construction which prevailed in the lower courts is found again in a portion of the charge which we quote as the final admonition to the jury: "Now, gentlemen, apply these principles to the case and determine from the evidence introduced upon the trial whether the defendant, Noah Johnson, at the time he struck and killed the decedent, Emory Barrows, was riding his bicycle with gross negligence, and was it such as an ordinarily reasonable and prudent person might and reasonably ought to have foreseen would endanger the lives and safety of others, and be likely to produce fatal injuries; and was such killing the direct, natural, and proximate result of such negligence? If the evidence satisfies you beyond a reasonable doubt of all these matters, then your verdict should be that the defendant is guilty of manslaughter as he stands charged in the indictment; otherwise you should acquit him."

In this language the trial court told the jury that if the defendant's conduct in the manner of riding the bicycle — its speed without signal of a bell — was, in their judgment, grossly negligent, it was an unlawful act, and they might find that in such conduct he was committing an unlawful act, and, if it resulted in the death of Barrows, the rider was guilty of manslaughter. And it was left to the jury, and they were directed to determine from the evidence whether or not the acts done were grossly negligent and regardless of the life and safety of another. If so, to convict.

We have no common law crimes in this state. We think such has been the uniform understanding of the bar, and the opinion of both the judicial and legislative departments of our commonwealth. Before the trial of this case there was but one other case brought to our attention where the proposition has been called in question. Weller *v.* The State of Ohio, 10 Circ. Dec. 381; 19 C. C. R. 166.

But this court has settled the commonly accepted rule in more than one case. In Sutcliffe *v.* The State, 18 Ohio, 469, 477, Justice Avery, speaking for the court, says: "There is no common law crime in this state, and we therefore look always to the statute to ascertain what is the offence of the prisoner, and what is to be his punishment . . ." Again on same page: "What is affirmed in this statute of manslaughter of the character which this court is intended to reach, except that the slayer must be in the commission at the time of some unlawful act?"

Also on page 477: "It is claimed for the plaintiff in error that there is no allegation in the count of the unlawful act designated in the statute. It was necessary to allege in the indictment that the person was engaged in the commission of some unlawful act. And this allegation, it appears to the court, is distinctly made in that part of the indictment which charges the prisoner with an assault upon the person killed, and unlawfully discharging and shooting off at him a loaded gun. This sufficiently declares an unlawful act . . ."

As before stated, our statute now provides for a shorter form of indictment, but it does not dispense with the ingredients of manslaughter as defined in the former statute.

In Smith *v.* The State, 12 Ohio St. 466, 469, this court says: "It must be borne in mind that we have no common law offences in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio, unless such act or omission is specially enjoined or prohibited by the statute law of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law."

The same statement of the law was again made in Mitchell *v.* The State, 42 Ohio St. 383, and other decisions of this court.

We think the same rule abides in many, if not all the other states of the Union whose legislatures have many codes or systems of statutory crimes. It evidently is true of the federal government as settled by repeated decisions of the Supreme Court of the United States. United States *v.* Worrall, 2 U. S. (2 Dall.) 384: United States *v.* Hudson and Goodwin, 11 U. S. (7 Cranch), 32; Pennsylvania *v.* Bridge Co., 54 U. S. (43 How.) 518, and later cases in that court. When our legislature first enacted statutes upon the subject of homicide and defining its different degrees, it did, as to manslaughter, what the state suggests, adopted almost literally the common law definition. Sutcliffe *v.* The State, 18 Ohio, 469, *supra.* But when this definition was borrowed and adopted by our legislature, it was adopted, not in part, but as a whole, and the act committed when the unintentional killing occurs, must be a violation of some prohibitory law. The very word "unlawful" in criminal jurisprudence means that and nothing less. Surely the legislature did not intend to adopt part of the common law description of the offence as a statutory provision, and leave the other part to the expansiveness of the common law. Yet, that is practically the construction which the lower courts must have placed upon our statute against manslaughter. We assume that the facts show conduct grossly negligent in character. There was no malice and no quarrel between defendant and the deceased. The killing was unintentional. It was manslaughter nevertheless, if the slayer was then in commission of some unlawful act. The jury were told that if in their judgment the accused was guilty of gross negligence and a disregard for the lives and safety of others, the state was entitled to a verdict of manslaughter. In considering this rather unusual, if not new construction of the law, we must not forget a few elementary principles of the law of negligence. It (negligence) may consist of acts of omission as well as commission; and what may be mere ordinary negligence under one class of circumstances and conditions, may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or very slight care. There are other definitions, but these are sufficient now for our purpose. So we may truly say that negligence differs only in degree. With this, we cannot overlook what experience has taught for many years, that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The inferences drawn from the same facts by different minds may often greatly differ. Hence, when we look to the case as it appeared in the trial court, we see that, without any rule of conduct prescribed by statute to govern the case, the rule for the first time was to be established by the verdict of the jury and sentence of the court.

Up to that time the behavior of the defendant had violated no law. It was for the jury to say, under the instructions given, whether the accused had been guilty of gross negligence. If so, although the killing was unintentional and free from malice, it was manslaughter. In England, the home of the common law and where it attained its wonderful growth, and from which we have borrowed to a large extent, it became necessary and was permissible to build up, by the pen of law writers and adjudged cases, a system of criminal jurisprudence, and enforce it until parliament would occupy the ground and supplant it. But that country, while so doing, was under no written constitution, and *ex post facto*, or retroactive laws might be laid down by the courts or enacted by parliament. Not so in this country where we have a written constitution prohibiting retroactive and *ex post facto* legislation. Weeks or months after the negligent acts involved in this case, we have the rule of conduct of the defendant passed upon and defined by a verdict upon the all important and indispensable element of manslaughter based on the facts of the case. It is retroactive in its effect. An act of the legislature attempting to so operate would be promptly held unconstitutional. Can we sustain a construction of our statute against manslaughter which will have the same effect?

In our judgment the unlawful act, the commission of which gives color and character to the unintentional killing, is an act prohibited by law, and that such is the natural meaning of the term or clause when used in the parlance of criminal jurisprudence.

Another observation is appropriate here: The uncertainty of the common law. Some principles which are deemed common law in Ohio are not so regarded in other states, and what some of them regard as common law we do not recognize as such in Ohio. Therefore, the wisdom of enacting a system of penal laws at the beginning of our statehood, and of improving and expanding it as fast as conditions of society required. The growth of such legislation is itself against the holdings of the lower courts. What acts or omissions in early years were harmless, owing to the sparsity of population and character of property and business then owned and conducted, afterwards, as population increased and business relations became diversified, became injurious to others; and in other respects the good order of society and the protection of life and property demanded and received appropriate legislation. That department of our state government has kept pace with the wrongs, the vices, and immoralities of our social and industrial life. It has gone farther, when occasion demanded, and has made criminal many acts and omissions which before belonged to the field of negligence, as witness, many provisions regarding the management of railroads, factories, and mines, and other branches of business where labor is employed. Many acts or omissions to act, which before were subject to the charge of negligence, are made penal by statute. And a consideration of this course of legislation demonstrates that there is no longer a necessity to turn to the common law to find what act or acts it is unlawful to commit.

If the contention of the state in this case is tenable, it is not difficult to see how the criminal dockets in our courts will soon be flooded. The gross negligence of one may unintentionally cause the death of many. If such negligence is the commission of an unlawful act, the killing of each of the slain becomes a separate crime of manslaughter. And so it would proceed, and the cases multiply according to the judgment of men, as to when the acts of others are or are not grossly negligent.

The position is untenable, and we decide that the judgments of the common pleas and circuit courts are erroneous and must be reversed, and the facts of this case being conceded, as stated herein, the plaintiff in error is discharged. *Reversed.*

Burket, Davis, and **Shauck,** JJ., concur.

REGINA *v.* EGAN.

Crown Case Reserved, Victoria. 1897.

[*Reported* 23 *Vic. L. R.* 159.]

The prisoner was convicted at the April criminal sittings of the court of the manslaughter of her male child, aged about eleven months. On the evening of the offence the prisoner had been drinking, and in a more or less intoxicated condition took the child into bed with her, overlay it, and thus caused its death by suffocation. The presiding judge, Hodges, J., directed the jury that if they believed this evidence they should find the prisoner guilty. The prisoner was convicted. Hodges, J., then reserved for consideration of the Full Court the question whether his direction was right.

Madden, C. J., delivered the judgment of the Court [**Madden**, C. J., **Hodges** and **Hood**, JJ.]. We think that the proposition involved in this case is too broad, and that, looking at all the circumstances, the charge of manslaughter cannot be supported. If a woman has made a resolution to kill her child, and, having allowed herself to become to some degree drunk, takes it to bed with her, knowing that in a heavy sleep she will probably overlie the child — apparently innocently, but at the same time with the intention to destroy the child — then that is murder. If, being in the state I have mentioned, she, knowing that she may overlie the child, and, against the advice or disregarding the remonstrances of her friends, takes the child to bed with her and overlies it, killing it, that is manslaughter. But the evidence in this case is to the effect that the defendant had been drinking, and while under the influence of liquor and after taking the child to bed with her, by an unhappy mischance overlay it; this, in our opinion. is not sufficient to sustain a charge of manslaughter.

SECTION IV.

Concurrence of Offence and Guilty Mind.

MORSE *v.* STATE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1825.

[*Reported* 6 *Connecticut*, 9.]

THIS was an information against the plaintiff in error, for a violation of the statute "concerning the students of Yale College," passed in May, 1822.[1] The information alleged that the defendant, on the 15th of January, 1824, gave credit to Washington Van Zandt, then a student of Yale College, and under the age of twenty-one years, for suppers, wine and other liquors, to the amount of seven dollars, without the knowledge of the parent or guardian of Van Zandt, and without the knowledge or consent of the officers of Yale College, or either of them.

On the trial before the county court the defendant claimed that if credit was given to Van Zandt by any one, it was given by Stephen Northam, who was the servant and bar-keeper of the defendant, against his express directions; and that the defendant could not be responsible criminally for such act of Northam. The court charged the jury that if they should find that the defendant had assented to Northam's act in giving credit to Van Zandt, after the credit was given, it was the same as if the defendant had previously authorized the giving of such credit; and that the defendant in that case would be liable as principal, the same as if he had been present, advising or consenting to the giving of such credit.[2]

The jury found the defendant guilty; who thereupon filed a bill of exceptions, and brought a writ of error; which was reserved for the advice of the Supreme Court of Errors.

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[1] The first section of this act is in these words: "That no person or persons shall give credit to any student of Yale College, being a minor, without the consent, in writing, of his parent or guardian, or of such officer or officers of the college as may be authorized, by the government thereof, to act in such cases, except for washing or medical aid." The 2d section inflicts a penalty from $20 to $300 for a violation of the law.

[2] Only so much of the case as relates to this point is given. — ED.

HOSMER, C. J. From the motion it is fairly to be inferred that no credit was given to Van Zandt by the defendant; but by Northam, his bar-keeper, only, without the knowledge or consent of Morse, and against his express directions. In the performance of this act, Northam was not the defendant's agent. He was not authorized to give the credit, either expressly or in the usual course of his business; but was prohibited from doing it. Notwithstanding this, which the court below impliedly admitted, the jury were charged that if the defendant subsequently assented to the acts of Northam he ratified them and made them his own. This was an unquestionable error. In the law of contracts, a posterior recognition, in many cases, is equivalent to a precedent command; but it is not so in respect of crimes. The defendant is responsible for his own acts, and for the acts of others done by his express or implied command, but to crimes the maxim *Omnis ratihabitio retrotrahitur et mandato equiparatur* is inapplicable.

In cases admitting of accessories, a subsequent assent merely would not render a person an accessory. *Judgment to be reversed.*

STATE *v.* MOORE.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1841.

[*Reported* 12 *New Hampshire,* 42.]

INDICTMENT for breaking and entering the house of Isaac Paddleford, at Lyman, in the night time, on the 19th day of November, 1840, with intent to steal, and stealing therefrom certain pieces of money.

It appeared in evidence that the prisoner went to the house, which is a public house, and asked for, and obtained lodging for the night, and that he took the money from a box in a desk in the bar-room, in the course of the night.

The jury were instructed that upon this indictment the prisoner might be convicted of burglary, of entering in the night time and stealing, or of larceny; that if the door of the bar-room were shut, and the prisoner left his own room in the night time, and opened the door of the bar-room, or any other door in his way thereto, except his own door, and stole the money, he was guilty of burglary; but that if he left his own room in the night, and stole the money from the bar-room, without opening any door on his way thereto, except his own door, he was guilty of entering in the night time and stealing.

The jury found the prisoner guilty of entering in the night time and stealing.

The counsel for the prisoner contended that under this indictment the prisoner could not be convicted of the offence of which he was found guilty.

He also contended that the prisoner, being a guest, and having entered the house with the assent of the owner, if guilty at all upon this evidence, was guilty of larceny only; and he moved to set aside the verdict, and for a new trial, for the reasons aforesaid.

Gove, Attorney-General, for the State.

Goodall, for the prisoner.

GILCHRIST, J.[1] It is said that, as the prisoner was lawfully in the house, he cannot be convicted of the offence of entering in the night time with intent to steal.

It is clear that the prisoner had a legal authority to enter the house, without any special permission for that purpose from the owner or landlord. If an innkeeper, or other victualler, hangs out a sign, and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he, without good reason, refuses to admit a traveller. 3 Bl. Com. 166. And an indictment at common law lies against an innkeeper if he refuses to receive a guest, he having at that time room in his house. If the traveller conducts properly, he is bound to receive him, at whatever hour of the night he may arrive. Rex *v.* Ivens, 7 C. & P. 213.

An innkeeper, holding out his inn "as a place of accommodation for travellers, cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them." Markham *v.* Brown, 8 N. H. Rep. 528. As he has authority to enter the house, so he may enter any of the common public rooms. Markham *v.* Brown. The bar-room of an inn is, from universal custom, the most public room in the house; and whether a traveller may, without permission, enter any of the private rooms or not, he has clearly a right to enter the bar-room.

If, after having made an entry into the house by authority of law, he commit a trespass, he may be held civilly responsible as a trespasser *ab initio*. This principle has always been recognized since the decision of The Six Carpenters' Case, 8 Coke, 290.

The prisoner, therefore, had a right to enter the inn, and the bar-room; and the question arises, whether the larceny committed in the bar-room can relate back, and give a character to the entry into the house, so as to make it criminal, and the prisoner punishable for it, upon reasoning similar to that which, in a civil action, would render him liable as a trespasser *ab initio.* Except the inference that may lawfully be made from the act of larceny, there is no evidence that he entered with any illegal purpose, or a felonious intent.

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[1] Part only of the opinion is given.

Where the law invests a person with authority to do an act, the consequences of an abuse of that authority by the party should be severe enough to deter all persons from such an abuse. But has this "policy of the law" ever been extended to criminal cases? We are not aware that it has. It is true that, in order to ascertain the intent of the accused, the law often regards the nature of the act committed. But this is generally such an act as could not have been committed with any other than a criminal purpose. Thus, the act of secretly taking the property of another, necessarily raises the presumption that the party intended to steal, and this presumption stands until explained by other evidence. In an indictment for breaking, etc., with intent to commit a felony, the actual commission is so strong a presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in the indictment. But where one lawfully enters a house, it by no means follows that because he steals, while there, he entered with that purpose. The act of stealing is evidence of the intent to steal; but is hardly sufficient to rebut the presumption that where he lawfully entered, he entered for a lawful purpose. To hold that, for a lawful entry, a party could be punished, because, after such entry, he does an unlawful act, would be to find him guilty of a crime by construction; a result which the law, in its endeavors always to ascertain the real intention of the accused, invariably, in theory, avoids, and which has seldom, in modern times, happened in practice.

A case is put by Lord Hale, the reasoning of which is analogous to that we have used in this case. "It is not a burglarious breaking and entry, if a guest at an inn open his own chamber door, and takes and carries away his host's goods, *for he has a right to open his own door*, and so not a burglarious breaking." 1 Hale P. C. 553, 554.

If a burglary could not be committed because the party had a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful.

For these reasons, the judgment of the court is that the verdict be set aside and a

New trial granted.

STATE *v.* ASHER.

SUPREME COURT OF ARKANSAS. 1887.

[*Reported* 50 *Arkansas*, 427.]

AT the May term, 1887, of the Phillips Circuit Court, appellees were indicted for a violation of section 1645 of Mansfield's Digest, — i. e., obtaining money under false pretences; Asher as principal and Fitzpatrick as accessory. It is charged in the indictment that on the 17th April, 1885, Asher applied to one J. P. Moore to purchase six mules; that he represented himself as being the absolute owner of the east half of lot 251, in the city of Helena; that it was free from incumbrance; that he could give a first lien on same; that he produced a deed of conveyance from L. A. Fitzpatrick, reciting the full payment of the purchase-money, and offered to secure the payment of the purchase-money of the mules by creating a first lien on said lot; that Moore sold him the mules on a credit to expire Nov. 1, 1885, and took a deed of trust on the lot to secure the purchase-money of the mules; that the deed of trust was executed by Asher on the 17th, and was filed for record on the 18th, day of April, 1885; that the sale of the mules was made on the faith of the security afforded by a first lien on the east half of said lot.

It is further charged that at the time Asher made these representations he had already executed to said Fitzpatrick a deed of trust upon said east half of said lot, to secure the purchase-money of same, which was more than the value of the lot; that said lot was not free from incumbrance; and that Asher falsely made the representation that he could give a first lien on said half-lot to deprive Moore of his property; that Fitzpatrick's deed of trust was filed for record on the 17th day of April, 1885. Fitzpatrick is indicted jointly with him as accessory.

At the November term, 1887, of the court, the defendant demurred to the indictment; the demurrer was sustained, and the State appeals.

COCKRILL, C. J. (after stating the facts as above set forth). To constitute an offence within the meaning of section 1645, Mansfield's Digest, something of value must be obtained by means of a false pretence with the intent to defraud. To obtain goods with the intent to defraud is not enough. It must be accomplished by a false pretence.

By the terms of the statute the pretence must be false. And the doctrine undoubtedly is, that if it is not false, though believed to be so by the person employing it, it is insufficient. 2 Bish. Cr. Law, s. 417. The false pretence charged in this case is Asher's representation that the mortgage, upon the security of which he got the mules from Moore, was the first lien on the land. If the representation is true, there is no foundation for this prosecution, however reprehensible Asher's motive may have been, because the false pretence would not be established. Now, construing all the allegations of the indictment together, is it shown that the representation was false? It is charged that Asher had previously executed a mortgage to his co-defendant, Fitzpatrick, for the full value of the land and that it was the prior lien; but it is also charged that Fitzpatrick counselled Asher to make the representation that the land was free from incumbrance and aided him in obtaining the mules from Moore on the faith of it. The demurrer admits that these allegations are true. Being true, the legal conclusion is that Fitzpatrick waived the priority of his lien and is estopped from asserting it against Moore. Scott *v.* Orbison, 21 Ark. 202; Gill *v.* Hardin, 48 Ark. 412; Shields *v.* Smith, 37 Id. 47.

Asher's representation that Moore's mortgage was the prior lien was therefore true. Moore got just what he bargained for, according to the allegations of the indictment, and he has not, therefore, been injured in any way. The statutory offence has not been committed. Morgan *v.* State, 42 Ark. 131. It is not, as counsel for the State argues, an attempt to have an offence condoned by repairing the injury done in its commission. There has been no criminal offence.

Moore might have been injured by the transaction if Fitzpatrick's mortgage-note had been negotiated according to the law merchant and assigned to an innocent holder for value before maturity. But there is no allegation of the existence of either of these facts, and there is no presumption that that state of facts exists. People *v.* Stone, 11 Wheat. 182–190.

Affirm.[1]

CHAPTER V.

CULPABILITY: MODIFYING CIRCUMSTANCES.

SECTION I.

Insanity.

M'NAGHTEN'S CASE.

ANSWER OF THE JUDGES TO THE HOUSE OF LORDS. 1843.

[*Reported* 10 *Clark & Finnelly*, 200.]

THE prisoner had been indicted for the murder of Edward Drummond.[1] The prisoner pleaded "Not guilty." Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner to prove that he was not, at the time of committing the act, in a sound state of mind.

LORD CHIEF JUSTICE TINDAL (in his charge). The question to be determined is, whether at the time the act in question was committed the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict, Not guilty, on the ground of insanity

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort having been made the subject of debate in the House of Lords, it was determined to take the opinion of the judges on the law governing such cases. Accordingly the judges attended the House of Lords; when (no argument having been had) questions of law were propounded to them.

LORD CHIEF JUSTICE TINDAL. My Lords, her Majesty's judges (with the exception of Mr. Justice Maule, who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships' House, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.

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[1] The statement of facts in this case has been abridged.

They have therefore confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary, in this particular case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships.

The first question proposed by your Lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly: "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And, thirdly: "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[1] The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act, knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate, when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusions only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.[1]

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[1] "I think that any one would fall within the description in question who was deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do. Suppose, for instance, that by reason of disease of the brain a man's mind is filled with delusions which, if true, would not justify or excuse his proposed act, but which in themselves are so wild and astonishing as to make it impossible for him to reason about them calmly, or to reason calmly on matters connected with them. Suppose, too, that the succession of insane thoughts of one kind and another is so rapid as to confuse him; and finally, suppose that his will is weakened by his disease, that he is unequal to the effort of calm sustained thought upon any subject, and especially upon subjects connected with his delusion; can he be said to know or have a capacity of knowing that the act which he proposes to do is wrong? I should say he could not." 2 Stephen Hist. Crim. Law, 164. — Ed

REGINA *v.* HAYNES.

WINCHESTER ASSIZES. 1859.

[*Reported* 1 *Foster & Finlayson*, 666.]

THE prisoner, a soldier, was charged with the murder of Mary MacGowan, at the camp at Aldershott.

The deceased was an "unfortunate woman" with whom the prisoner had been intimate, and was on the most friendly terms up to the moment of the commission of the offence. No motive was assigned for the perpetration of the act; and general evidence was given that the prisoner, while in Canada, having seduced a young woman under a promise of marriage, which he had been unable to fulfil by reason of his regiment having been ordered home, his mind had been much affected by the circumstance.[2]

BRAMWELL, B., to the jury. As to the defence of insanity set up for the prisoner, I will read you what the law is as stated by the judges in answer to questions put to them by the House of Lords. (*Having done so.*) It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But I must remark as to that that the circumstance of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief; but if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint, — that forbidding and punishing its perpetration. We must therefore return to the simple question you have to determine, — did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong? *Guilty. Sentence, death.*

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[1] The answer to the fifth question is omitted. MAULE, J. delivered a separate opinion, which he prefaced by stating that he felt great difficulty in answering the questions: first, because they did not appear to arise out of a particular case, which might explain or limit the generality of their terms; secondly, because he had heard no argument on the subject of the questions; and thirdly, from a fear that the answers might embarrass the administration of justice, when they should be cited in criminal trials. In reply to the first question he said that "to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should be such as renders him incapable of knowing right from wrong." In reply to the second and third questions, he said that the matters referred to in them were entirely within the discretion of the judge trying the case. To the fourth question he gave the same answer as to the first. — ED.

[2] Part of the case, relating to another point, is omitted.

The prisoner was reprieved.

COMMONWEALTH *v.* ROGERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1844.

[*Reported* 7 *Metcalf*, 500.]

THE defendant was indicted for the murder of Charles Lincoln, Junior, warden of the state prison, on the 15th of June, 1843.[1]

The evidence was full and uncontradicted that the defendant, at the time alleged in the indictment, was a prisoner in the state prison, and then and there killed the warden of the prison by stabbing him in the neck with a knife. The sole ground on which the defendant's counsel placed his defence was that he was insane when he committed the homicide; and most of the evidence, on both sides, related to this single point. The superintendents of several insane hospitals were witnesses in the case, and their testimony tended strongly to prove that the defendant, at the time of the homicide, was laboring under that species of insanity which is hereinafter commented on by the chief justice in the charge of the court to the jury.

The opinion of the court on the law of the case was given in the following charge to the jury by

SHAW, C. J. In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

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[1] Part of the case, not involving a question of insanity, is omitted.

But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, — a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act he will do wrong and receive punishment, — such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

If, then, it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The character of the mental disease relied upon to excuse the accused in this case is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion by which the mind is perverted. The most common of these cases is that of *monomania*, when the mind broods over *one idea* and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes: 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act, — as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates to an experienced person that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in homicide or other violent acts towards friend or foe indiscriminately; so that, although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

The questions, then, in the present case, will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false but sincere belief that the warden had a design to shut him up, and, under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent?

If such was the case, the accused is entitled to an acquittal; otherwise, as the evidence proves beyond all doubt the fact of killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty, and barbarity, he must undoubtedly be convicted of wilful murder.

The ordinary presumption is that a person is of sound mind until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence, offered on his part; in either case, it must be sufficient to establish the fact of insanity; otherwise, the presumption will stand.

The jury, after being in consultation several hours, came into court, and asked instructions upon these two questions: "Must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offence?"

In answer to the first of these questions, the chief justice repeated his former remarks on the same point, and added that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. In answer to the second question, the chief justice added nothing to the instructions which he had previously given.

The jury afterwards returned a verdict of "Not guilty, by reason of insanity."[1]

STATE *v.* RICHARDS.

SUPERIOR COURT, CONNECTICUT. 1873.

[*Reported* 39 *Connecticut*, 591.]

INFORMATION for burning a barn; brought to the Superior Court for Windham County and tried to the jury, at its August term, 1873, on the plea of not guilty, before SEYMOUR, J.

The defence was that the prisoner had not sufficient mental capacity to be criminally responsible for the act. The charge of the judge, which sufficiently states the facts of the case, was as follows: —

SEYMOUR, J. The evidence seems ample to warrant you in finding that the burning complained of was caused by the prisoner. Your attention has been turned mainly to the question whether the act was done with the felonious intent charged, and this question depends mainly upon another, whether the accused has sufficient mental capacity to warrant us in imputing to him a felonious intent.

That he is considerably below par in intellect is apparent to us all This is indicated by his countenance and general appearance.

The same thing is indicated by his extraordinary conduct at the fire. As the flames were bursting out he was seen on all fours crawling back from under the burning barn, with no clothing upon him except his shirt and trousers. The day was excessively cold. He remained some half-hour, thus scantily clothed, gazing stupidly at the blaze, until ordered into the house. All this took place in broad daylight, in plain view of Mr. Gallup's house.

But it is undoubtedly true, as the attorney for the state contends, that mere inferiority of intellect is no answer to the prosecution. We are, therefore, called upon in this case to decide an interesting and difficult question, to wit, whether the accused has sufficient mind to be held responsible as a criminal.

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[1] "To punish a homicide, committed by the insane victim of such delusion, and under its resistless influence, would be punishing for what every other man in the same condition would ever do, in defiance of all penal consequences; and, therefore, such punishment would be useless and inconsistent with the preventive aim of all criminal jurisprudence." — ROBERTSON, J., in Smith *v.* Com., 1 Duv. 224.

"Whether *passion* or *insanity* was the ruling force and controlling agency which led to the homicide, — in other words, whether the defendant's act was the insane act of an unsound mind, or the outburst of violent, reckless, and uncontrolled passion, in a mind not diseased, — is the practical question which the jury should be told to determine." — DILLON, C. J., in State *v.* Felter, 25 Iowa, 67. — ED.

He is not a mere idiot, nor does he appear to be a lunatic. He suffers from want of mind rather than from derangement or delusion, and the question is whether the want of mind is such as to entitle him to acquittal on the ground of what in law is termed dementia.

This inquiry is attended with inherent difficulties. Our knowledge of our own minds is imperfect: our knowledge of the precise mental condition of another is necessarily still more imperfect. We as triers are obliged to rely upon the evidence furnished us by witnesses whose means of knowledge are limited, and who find great difficulty in communicating to us, on a subject of this nature, what they do know.

Our principal embarrassment arises, however, from the want of a definite measure of mental capacity. Eminent judges and learned commentators have attempted to furnish rules and tests for the guidance of triers in cases of this kind, but upon examination these rules and tests turn out to be imperfect and unsatisfactory.

It was formerly thought that the jury might properly convict if the accused had any sense of right and wrong, or if he was aware that punishment would follow the commission of an offence.

But children of very tender years have some sense of right and wrong, and fully understand that punishment will follow transgression. Such children are subjected by their parents to discipline, and are by gentle punishments restrained from wrong-doing; but our sense of humanity would be greatly shocked at the thought of subjecting children to the penalties of statute law because some sense of right and wrong and fear of punishment had been developed in them.

So, again, it is often said in the books that a person is to be deemed responsible for crime if he understands the consequences and effects of the act laid to his charge. This is undoubtedly and obviously true if he has such understanding and appreciation of consequences as pertain to other men. But if he has less of it than is common to men in general, how much less must it be to escape responsibility?

I think the accused had some knowledge of the consequences of his acts. He probably knew that by igniting a match and throwing it into a hay-mow a fire would be kindled and that the barn would thereby be consumed. He perhaps also had some appreciation of the loss and destruction of property which would ensue.

But I am not willing to say that some knowledge of consequences, however faint and imperfect, is sufficient to warrant you in convicting the prisoner. I can give you no precise rule, but I think it clear that if the prisoner's perception of consequences and effects was only such as is common to children of tender years he ought to be acquitted.

And this leads me to refer to the rule adopted by an eminent English judge, Lord Hale. He reasoned that, inasmuch as children under fourteen years of age are *prima facie* incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age.

If this test be adopted, the prisoner will upon the testimony be entitled to an acquittal. The principal witnesses for the prosecution say that he is inferior in intellect to children of ten years of age, and several very intelligent witnesses for the defence testify that they are acquainted with many children of six years who are his superiors in mental capacity.

I am inclined to recommend Lord Hale's rule to your adoption, not however without qualifications which I think it important to observe.

And first, this test, like all others which I know of, is imperfect.

Probably no two of us have the same idea of the capacity of children of fourteen years of age; and then there is this further difficulty, that there can be no accurate comparison in detail between the healthy and properly balanced, though immature, mind of a child, and the unhealthy, abnormal, and shrivelled intellect of an imbecile. The comparison therefore is only of the general result in their respective appreciation of right and wrong and of consequences and effects.

This further consideration ought also to be borne in mind: that though in modern times persons under fourteen are seldom subjected to the penalties of the criminal code, yet in law children between seven and fourteen may be subjects of punishment if they are shown to be of sufficient capacity to commit crimes. In applying Lord Hale's rule therefore, the child to be taken as the standard ought not to be one who has had superior advantages of education, but should rather be one in humble life, with only ordinary training.

And after all, gentlemen, you see that I can furnish you with no definite measure of mental capacity to apply to the prisoner. The whole matter must be submitted to your sound judgment. You will say whether the prisoner has such knowledge of right and wrong, and such appreciation of the consequence and effects of his acts, as to be a proper subject of punishment. Opinions on this subject have been expressed by most of the witnesses who have testified. These opinions depend for their value mainly upon the facts with which they are connected. You have the advantage of being able to compare with each other all the facts which have been brought to your notice bearing upon the prisoner's mental condition. You will look carefully at all these facts. The history of the prisoner's life is somewhat significant. From early childhood it has been spent in almhouses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment. When so left, he seems to have acted without forecast, under the pressure of immediate wants and impulses.

If you acquit the prisoner on the ground of want of mental capacity you will so say in your verdict, in order that the prisoner may in that event have the benefit under our statute of a home where he will be kindly cared for, but kept under such restraints as to prevent his doing injury to the persons or property of others.

The jury acquitted the prisoner, stating in their verdict that the acquittal was on the ground of want of mental capacity.[1]

FLANAGAN *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1873.

[*Reported* 52 *New York*, 467.]

ANDREWS, J. ' The judge, among other things, charged the jury that, "to establish a defence on the ground of insanity, it must be clearly proven that, at the time of committing the act (the subject of the indictment), the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; and, if he did know it, that he did not know he was doing wrong;" and to this part of the charge the prisoner, by his counsel, excepted.

The part of the charge excepted to was in the language employed by TINDAL, C. J., in McNaghten's Case, 10 Clarke & Fin. 210, in the response of the English judges to the questions put to them by the House of Lords as to what instructions should be given to the jury, on a trial of a prisoner charged with crime, when the insane delusion of the prisoner, at the time of the commission of the alleged act, was interposed as a defence.

All the judges, except one, concurred in the opinion of TINDAL, C. J., and the case is of the highest authority; and the rule declared in it has been adhered to by the English courts.

MAULE, J., gave a separate opinion, in which he declared that, to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law, as it has long been understood and held, be such as to render him incapable of knowing right from wrong.

In the case of The People *v.* Bodine, 4 Denio, 9, the language of TINDAL, C. J., in the McNaghten Case, was quoted and approved; and BEARDSLEY, J., said: "Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act was done."

The rule was reaffirmed in the case of Willis *v.* The People, 32 N. Y., 717, and it must be regarded as the settled law of this State, that the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defence, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of the inquiry.

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[1] See Wartena *v.* State, 105 Ind. 445, 5 N. E. 20. — ED.

We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter.

The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid.

Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law.

The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility in cases of crime, may well cause courts to pause before assenting to it.

Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Rolfe, B., in Rogers *v.* Allunt, where, on the trial of an indictment for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: "Every crime was committed under an influence of such a description; and the object of the law was to compel people to control these influences."

Judgment affirmed.

PARSONS *v.* STATE.

SUPREME COURT OF ALABAMA. 1886.

[*Reported* 81 *Ala.* 577.]

SOMERVILLE, J.[1] In this case the defendants have been convicted of the murder of Bennett Parsons, by shooting him with a gun, one of the defendants being the wife and the other the daughter of the deceased. The defence set up in the trial was the plea of insanity, the evidence tending to show that the daughter was an idiot, and the mother and wife a lunatic, subject to insane delusions, and that the killing on her part was the offspring and product of those delusions.

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[1] Part only of the opinion is given. The dissenting opinion of STONE, C. J., is omitted.

The rulings of the court raise some questions of no less difficulty than of interest, for, as observed by a distinguished American judge, "of all medico-legal questions, those connected with insanity are the most difficult and perplexing." (Per Dillon, C. J., in State *v.* Felter, 25 Iowa, 67.) It has become of late a matter of comment among intelligent men, including the most advanced thinkers in the medical and legal professions, that the deliverances of the law courts on this branch of our jurisprudence have not heretofore been at all satisfactory, either in the soundness of their theories, or in their practical application. The earliest English decisions, striving to establish rules and tests on the subject, including alike the legal rules of criminal and civil responsibility, and the supposed tests of the existence of the disease of insanity itself, are now admitted to have been deplorably erroneous, and, to say nothing of their vacillating character, have long since been abandoned. The views of the ablest of the old text writers and sages of the law were equally confused and uncertain in the treatment of these subjects, and they are now entirely exploded. Time was in the history of our laws that the veriest lunatic was debarred from pleading his providential affliction as a defence to his contracts. It was said, in justification of so absurd a rule, that no one could be permitted to stultify himself by pleading his own disability. So great a jurist as Lord Coke, in his attempted classification of madmen, laid down the legal rule of criminal responsibility to be that one should "*wholly* have lost his memory and understanding;" as to which Mr. Erskine, when defending Hadfield for shooting the king, in the year 1800, justly observed: "No such madman ever existed in the world." After this great and historical case, the existence of delusion promised for a while to become the sole test of insanity, and acting under the duress of such delusion was recognized in effect as the legal rule of responsibility. Lord Kenyon, after ordering a verdict of acquittal in that case, declared with emphasis that there was "no doubt on earth" the law was correctly stated in the argument of counsel. But, as it was soon discovered that insanity often existed without delusions, as well as delusions without insanity, this view was also abandoned. Lord Hale had before declared that the rule of responsibility was measured by the mental capacity possessed by a child fourteen years of age; and Mr. Justice Tracy, and other judges, had ventured to decide that, to be non-punishable for alleged acts of crime, "a man must be totally deprived of his understanding and memory, so as not to know what he was doing, no more than an infant, a brute, or *a wild beast.*" (Arnold's Case, 16 How. St. Tr. 764.) All these rules have necessarily been discarded in modern times in the light of the new scientific knowledge acquired by a more thorough study of the disease of insanity. In Bellingham's Case, decided in 1812 by Lord Mansfield at the Old Bailey (Coll. on Lun. 630), the test was held to consist in a knowledge that murder, the crime there committed, was "against the laws of God and nature," thus meaning an ability to distinguish between right and wrong in the abstract.

This rule was not adhered to, but seems to have been modified so as to make the test rather a knowledge of right and wrong as applied to the particular act. (Lawson on Insanity, 231, § 7 *et seq*). The great leading case on the subject in England is McNaghten's Case, decided in 1843 before the English House of Lords, 10 Cl. & F. 200; s. c., 2 Lawson's Cr. Def. 150. It was decided by the judges in that case that, in order to entitle the accused to acquittal, it must be clearly proved that, at the time of committing the offence, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did, not to know that what he was doing was wrong. This rule is commonly supposed to have heretofore been adopted by this court, and has been followed by the general current of American adjudications. Boswell *v.* The State, 63 Ala. 307; s. c. 35 Amer. Rep. 20; s. c. 2 Lawson's Cr. Def. 352; McAllister *v.* State, 17 Ala. 434; Lawson on Insanity, 219–221, 231.

In view of these conflicting decisions, and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common law jurisprudence a century ago. The trial court, with prudent propriety, followed the previous decisions of this court, the correctness of which, as to this subject, we are now requested to review.

We do not hesitate to say that we re-open the discussion of this subject with no little reluctance, having long hesitated to disturb our past decisions on this branch of the law. Nothing could induce us to do so except an imperious sense of duty, which has been excited by a protracted investigation and study, impressing our minds with the conviction that the law of insanity as declared by the courts on many points, and especially the rule of criminal accountability, and the assumed tests of disease to that extent which confers legal irresponsibility, have not kept pace with the progress of thought and discovery in the present advanced stages of medical science. Though science has led the way, the courts of England have declined to follow, as shown by their adherence to the rulings in McNaghten's Case, emphasized by the strange declaration made by the Lord Chancellor of England, in the House of Lords, on so late a day as March 11, 1862, that "the introduction of medical opinions and medical theories into this subject has proceeded upon *the vicious principle of considering insanity as a disease!*"

It is not surprising that this state of affairs has elicited from a learned law writer, who treats of this subject, the humiliating declaration that, under the influence of these ancient theories, "the memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals." 1 Bish. Cr. Law (7th ed.) § 390. There is good reason, both for this fact and for the existence of unsatisfactory rules on this subject. In what we say we do not intend to give countenance to acquittals of criminals, frequent examples of which have been witnessed in modern times, based on the doctrine of moral or emotional insanity, unconnected with mental disease, which is not yet sufficiently supported by psychology, or recognized by law as an excuse for crime. Boswell's case, *supra;* 1 Whar. Cr. Law (9th ed.), § 43.

In ancient times lunatics were not regarded as "unfortunate sufferers from disease, but rather as subjects of demoniacal possession, or as self-made victims of evil passions." They were not cared for humanely in asylums and hospitals, but were incarcerated in jails, punished with chains and stripes, and often sentenced to death by burning or the gibbet. When put on their trial, the issue before the court then was not as now. If acquitted, they could only be turned loose on the community to repeat their crimes without molestation or restraint. They could not be committed to hospitals, as at the present day, to be kept in custody, cared for by medical attention, and often cured. It was not until the beginning of the present century that the progress of Christian civilization asserted itself by the exposure of the then existing barbarities, and that the outcry of philanthropists succeeded in eliciting an investigation of the British Parliament looking to their suppression. Up to that period the medical treatment of the insane is known to have been conducted upon a basis of ignorance, inhumanity, and empiricism. Amer. Cyclopædia, vol. ix. (1874), title, Insanity. Being punished for wickedness, rather than treated for disease, this is not surprising. The exposure of these evils not only led to the establishment of that mos beneficent of modern civilized charities, the Hospital and Asylum for the Insane, but also furnished hitherto unequalled opportunities to the medical profession of investigating and treating insanity on the pathological basis of its being a disease of the mind. Under these new and more favorable conditions the medical jurisprudence of insanity has assumed an entirely new phase. The nature and exciting causes of the disease have been thoroughly studied and more fully comprehended. The result is that the "right and wrong test," as it is sometimes called, which, it must be remembered, itself originated with the medical profession, in the mere dawn of the scientific knowledge of insanity, has been condemned by the great current of modern medical authorities, who believe it to be "founded on an ignorant and imperfect view of the disease." Encyc. Brit. vol. xv. (9th ed.), title, Insanity.

The question then presented seems to be whether an old rule of legal responsibility shall be adhered to based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity except the single test of mental capacity to distinguish right and wrong, or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed. In establishing any new rule, we should strive, however, to have proper regard for two opposite aspects of the subject, lest, in the words of Lord Hale, "on one side there be a kind of inhumanity towards the defects of human nature; or, on the other, too great indulgence to great crimes."

It is everywhere admitted, and as to this there can be no doubt, that an idiot, lunatic, or other person of diseased mind, who is afflicted to such extent as not to know whether he is doing right or wrong, is not punishable for any act which he may do while in that state.

Can the courts justly say, however, that the only test or rule of responsibility in criminal cases is the power to distinguish right from wrong, whether in the abstract, or as applied to the particular case? Or may there not be insane persons of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as matter of fact, so far under *the duress of such disease* as to destroy *the power to choose* between right and wrong? Will the courts assume as a fact, not to be rebutted by any amount of evidence, or any new discoveries of medical science, that there is, and can be, no such state of the mind as that described by a writer on psychological medicine, as one "in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former, nor abstain from the latter"? Dean's Med. Jur. 497.

Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from that of the court in the trial of a case of this character. The province of the jury is to determine facts, that of the court to state the law. The rule in McNaghten's Case arrogates to the court, in legal effect, the right to assert, as matter of law, the following propositions: —

1. That there is but a single test of the existence of that degree of insanity, such as confers irresponsibility for crime.
2. That there does not exist any case of such insanity in which that single test — the capacity to distinguish right from wrong — does not appear.
3. That all other evidences of alleged insanity, supposed by physicians and experts to indicate a destruction of the freedom of the human will and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

The whole difficulty, as justly said by the Supreme Judicial Court of New Hampshire, is that "courts have undertaken to declare that to be law which is *matter of fact.*" "If" observes the same court, "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself to be qualified to testify as an expert." State *v.* Pike, 49 N. H. 399.

We first consider what is *the proper legal rule of responsibility in criminal cases.*

No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will. Mr. Wharton, after recognizing this fundamental and obvious principle, observes: "If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility." 1 Whar. Cr. Law (9th ed.), § 33. Says Mr. Bishop, in discussing this subject: "There cannot be, and there is not, in any locality, or age, a law punishing men for what they cannot avoid." 1 Bish. Cr. Law (7th ed.), § 383*b*.

If, therefore, it be true, as matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim *to choose* between the right and wrong, although he perceive it, — by which we mean the power of volition to adhere in action to the right and abstain from the wrong, — is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not; and such we believe to be the just, reasonable, and humane rule towards which all the modern authorities in this country, legislation in England, and the laws of other civilized countries of the world, are gradually, but surely tending, as we shall further on attempt more fully to show.

We next consider the question as to the *probable existence of such a disease*, and the *test of its presence* in a given case.

It will not do for the courts to dogmatically deny the possible existence of such *a disease*, or its pathological and psychical effects, because this is a matter of evidence, not of law, or judicial cognizance. Its existence, and effect on the mind and conduct of the patient, is a question of fact to be proved, just as much as the possible existence of cholera or yellow fever formerly was before these diseases became the subjects of common knowledge, or the effects of delirium from fever, or intoxication from opium and alcoholic stimulants would be. The courts could, with just as much propriety years ago, have denied the existence of the Copernican system of the universe, the efficacy of steam and electricity as a motive power, or the possibility of communication in a few moments between the continents of Europe and America by the magnetic telegraph, or that of the instantaneous transmission of the human voice from one distant city to another by the use of the telephone. These are scientific facts, first discovered by experts before becoming matters of common knowledge. So, in like manner, must be every other unknown scientific fact, in whatever profession or department of knowledge. The existence of such a cerebral disease as that which we have described is earnestly alleged by the superintendents of insane hospitals and other experts who constantly have experimental dealings with the insane, and they are permitted every day to so testify before juries. The truth of their testimony — or what is the same thing, the existence or non-existence of such a disease of the mind — in each particular case, is necessarily a matter for the determination of the jury from the evidence.

So it is equally obvious that the courts cannot, upon any sound principle, undertake to say what are the invariable or infallible tests of such disease. The attempt has been repeatedly made, and has proved a confessed failure in practice. "Such a test," says Mr. Bishop, "has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist." 1 Bish. Cr. Law (7th ed.), § 381. In this conclusion, Dr. Ray, in his learned work on the Medical Jurisprudence of Insanity, fully concurs. Ray's Med. Jur. Ins. p. 39. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike. "The fact of its existence," says Dr. Ray, "is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." Ray's Med. Jur. of Ins. § 24. Its exciting causes being moral, psychical, and physical are the especial subjects of specialists' study. What effect may be exerted on the given patient by age, sex, occupation, the seasons, personal surroundings, hereditary transmission, and other causes is the subject of evidence based on investigation, diagnosis, observation, and experiment. Peculiar opportunities, never before enjoyed in the history of our race, are offered in the present age for the ascertainment of these facts, by the establishment of asylums for the custody and treatment of the insane, which Christian benevolence and statesmanship have substituted for jails and gibbets. The testimony of these experts — differ as they may in many doubtful cases — would seem to be the best which can be obtained, however unsatisfactory it may be in some respects.

In the present state of our law, under the rule in McNaghten's Case, we are confronted with this practical difficulty, which itself demonstrates the defects of the rule. The courts in effect charge the juries, as matter of law, that no such mental disease exists as that often testified to by medical writers, superintendents of insane hospitals, and other experts, — that there can be as matter of scientific fact no cerebral defect, congenital or acquired, which destroys the patient's power of self-control, his liberty of will and action, provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence; asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and in fact that "the whole management of such asylums presupposes a knowledge of right and wrong on the part of their inmates." Guy & F. on Forensic Med. 220. The result in practice, we repeat, is that the courts charge one way, and the jury, following an alleged higher law of humanity, find another in harmony with the evidence.

In Bucknill on Criminal Lunacy, p. 59, it is asserted as "the result of observation and experience, that in all lunatics and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist."

"With regard to this test," says Dr. Russell Reynolds, in his work on "The Scientific Value of the Legal Tests of Insanity," p. 34 (London, 1872), "I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of Nature."

In the learned treatise of Drs. Bucknill and Tuke on "Psychological Medicine," p. 269 (4th ed. London, 1879), the legal tests of responsibility are discussed, and the adherence of the courts to the right and wrong test is deplored as unfortunate, the true principle being stated to be "whether, in consequence of congenital defect or acquired disease, *the power of self-control* is absent altogether, or is so far wanting as to render the individual irresponsible." It is observed by the authors: "As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness through cerebral defect or disease to do right is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows."

Dr. Peter Bryce, Superintendent of the Alabama Insane Hospital for more than a quarter-century past, alluding to the moral and disciplinary treatment to which the insane inmates are subjected, observes: "They are dealt with in this institution, as far as it is practicable to do so, as rational beings; and it seldom happens that we meet with an insane person who cannot be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society." Sixteenth Annual Rep. Ala. Insane Hosp. (1876), p. 22; Biennial Rep. (1886), pp. 12–18.

Other distinguished writers on the medical jurisprudence of insanity have expressed like views, with comparative unanimity. And nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country. A notable instance is found in the following resolution unanimously passed at the annual meeting of the British Association of medical officers of Asylums and Hospitals for the insane, held in London, July 14, 1864, where there were present fifty-four medical officers: —

"*Resolved,* That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." Judicial Aspects of Insanity (Ordronaux, 1877), 423–424.

These testimonials as to a scientific fact are recognized by intelligent men in the affairs of every-day business, and are constantly acted on by juries. They cannot be silently ignored by judges. Whether established or not, there is certainly respectable evidence tending to establish it, and this is all the courts can require.

Nor are the modern law writers silent in their disapproval of the alleged test under discussion. It meets with the criticism or condemnation of the most respectable and advanced in thought among them, the tendency being to incorporate in the legal rule of responsibility "not only *the knowledge* of good and evil, but the *power to choose* the one, and refrain from the other." Browne's Med. Jur. of Insanity, §§ 13 *et seq.*, § 18; Ray's Med. Jur. §§ 16–19; Whart. & Stilles' Med. Jur. § 59; 1 Whart. Cr. Law (9th ed.), §§ 33, 43, 45; 1 Bish. Cr. Law (7th ed.), § 386 *et seq.;* Judicial Aspects of Insanity (Ordronaux), 419; 1 Green. Ev. § 372; 1 Steph. Hist. Cr. Law, § 168; Amer. Law Rev. vol. iv. (1869–70), 236 *et seq.*

The following practicable suggestion is made in the able treatise of Balfour Browne above alluded to: "In a case of alleged insanity, then," he says, "if the individual suffering from enfeeblement of intellect, delusion, or any other form of mental aberration, was looked upon as, to the extent of this delusion, under the influence of duress (the dire duress of disease), and in so far *incapacitated to choose* the good and eschew the evil, in so far, it seems to us," he continues, "would the requirements of the law be fulfilled; and in that way it would afford an opening, by the evidence of experts, for the proof of the amount of self-duress in each individual case *and thus alone can the criterion of law and the criterion of the inductive science of medical psychology be made to coincide.*" Med. Jur. of Ins. (Browne), § 18.

This, in our judgment, is the practical solution of the difficulty before us, as it preserves to the courts and the juries, respectively, a harmonious field for the full assertion of their time-honored functions.

So great, it may be added, are the embarrassments growing out of the old rule, as expounded by the judges in the House of English Lords, that, in March, 1874, a bill was brought before the House of Commons, supposed to have been drafted by the learned counsel for the Queen, Mr. Fitzjames Stephen, which introduced into the old rule the new element of an absence of the power of self-control, produced by diseases affecting the mind; and this proposed alteration of the law was cordially recommended by the late Chief Justice Cockburn, his only objection being that the principle was proposed to be limited to the case of homicide. 1 Whart. Cr. Law (9th ed.), § 45, p. 66, note 1; Browne's Med. Jur. of Insan. § 10, note 1.

There are many well considered cases which support these views.[1]

The law of Scotland is in accord with the English law on this subject, as might well be expected. The Criminal Code of Germany, however, contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country: "There is no criminal act when the actor at the time of the offence is in a state of unconsciousness, or morbid disturbance of the mind, *through which the free determination of his will is excluded.*" Encyc. Brit. (9th ed.), vol. ix. p. 112; citing Crim. Code of Germany (§ 51, R. G. B.).

The Code of France provides: "There can be no crime or offence if the accused was in a state of *madness* at the time of the act." For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country.

It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in McNaghten's Case, *supra*, is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself. The practical trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals, — where, in other words, the border line of punishability is adjudged to be passed. But, as has been said in reference to an everyday fact of Nature, no one can say where twilight ends or begins, but there is ample distinction nevertheless between *day* and *night.* We think we can safely rely in this matter upon the intelligence of our juries, guided by the testimony of men who have practically made a study of the disease of insanity, and enlightened by a conscientious desire, on the one hand, to enforce the criminal laws of the land, and on the other, not to deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason, or the power of volition.

It is almost needless to add that where one does not act under the duress of a diseased mind, or insane delusion, but from motives of anger, revenge, or other passion, he cannot claim to be shielded from punishment for crime on the ground of insanity. Insanity proper is more or less a mental derangement, coexisting often, it is true, with a disturbance of the emotions, affections, and other moral powers. A mere moral, or emotional insanity, so-called, unconnected with disease of the mind, or irresistible impulse resulting from mere moral obliquity, or wicked propensities and habits, is not recognized as a defence to crime in our courts. 1 Whar. Cr. Law (9th ed.), § 46; Boswell *v.* State, 63 Ala. 307, 35 Amer. Rep. 20; Ford *v.* State, 71 Ala. 385.

The charges refused by the court raise the question as to how far one acting under the influence of an insane delusion is to be exempted from criminal accountability. The evidence tended to show that one of the defendants, Mrs. Nancy J. Parsons, acted under the influence of an insane delusion that the deceased, whom she assisted in killing, possessed supernatural power to afflict her with disease, and to take her life by some "supernatural trick;" that by means of such power the deceased had caused defendant to be in bad health for a long time, and that she acted under the belief that she was in great danger of the loss of her life from the conduct of deceased operating by means of such supernatural power.

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[1] The consideration of certain authorities on the subject is omitted.

The rule in McNaghten's Case, as decided by the English judges, and supposed to have been adopted by the court, is that the defence of insane delusion can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act; or, in the language of the English judges themselves, the defendant "must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." Boswell's case, 63 Ala. 307. It is apparent, from what we have said, that this rule cannot be correct as applied to all cases of this nature, even limiting it, as done by the English judges, to cases where one "labors under partial delusion, and is not in other respects insane." McNaghten's Case, 10 Cl. & F. 200; s. c. 2 Lawson's Cr. Def. 150. It holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion, operating upon a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence. Fields' Med. Leg. Guide, 101–104; Guy & F. on Forensic Med. 220. If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act, or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances have justified a man perfectly sane in shooting or killing. If he dare fail to reason on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or, if, in fine, he may have been so negligent as not to have declined combat, when he could do so safely without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be little less than inhumane, and its strict enforcement would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion proceeding from a diseased brain can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong. This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the courts. We think it sufficient if the insane delusion — by which we mean the delusion proceeding from a *diseased mind* — sincerely exists at the time of committing the alleged crime, and the defendant believing it to be real, is so influenced by it as either to render him incapable of perceiving the true nature and quality of the act done, by reason of the depravation of the reasoning faculty, or so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of *the duress of the disease.* In such a case, in other words, there must exist either one of two conditions: (1) such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular act; (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain. Rex *v.* Hadfield, 37 How. St. Tr. 1282; s. c., 2 Lawson's Cr. Def. 201; Roberts *v.* State, 3 Ga. 310; Com. *v.* Rogers, 7 Met. 500; State *v.* Windsor, 5 Harr. 512; Buswell on Insan. §§ 434, 440; Amer. Law Review, vol. iv. (1869–70) pp. 236–252.

In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly from what we have said that the inquiries to be submitted to the jury, then, in every criminal trial where the defence of insanity is interposed, are these: —

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a *disease of the mind*, so as to be either idiotic, or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

(1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

(2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

The rule announced in Boswell's Case, 63 Ala. 308, *supra*, as stated in the fourth head note, is in conflict with the foregoing conclusions, and to that extent is declared incorrect, and is not supported by the opinion in that case, otherwise than by *dictum*.

We adhere, however, to the rule declared by this court in Boswell's case, *supra*, and followed in Ford's Case, 71 Ala. 385, holding that when insanity is set up as a defence in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

The judgment is reversed, and the cause remanded. In the meanwhile the prisoners will be held in custody until discharged by due process of law.

STONE, C. J., dissents in part.

NOTE ON THE TEST OF INSANITY. The test of insanity laid down by the judges in McNaghten's Case, *supra* (usually known as "the knowledge of right and wrong test"), prevails in many jurisdictions, and "irresistible impulse" is held not to be such insanity as will excuse from crime. U. S. *v.* Shults, 6 McLean, 121; U. S. *v.* Young, 25 F. R. 710; People *v.* Hoin, 62 Cal. 120; U. S. *v.* Guiteau, 10 F. R. 161 (D. C.); Brinkley *v.* State, 58 Ga. 296; State *v.* Mowry, 37 Kas. 369, 15 Pac. 282; State *v.* Scott, 41 Minn. 365 (but see State *v.* Shippey, 10 Minn. 223; State *v.* Erb, 74 Mo. 199; Flanagan *v.* People, 52 N. Y. 467 (*supra*); State *v.* Brandon, 8 Jones, 463; State *v.* Murray, 11 Or. 413, 5 Pac. 55; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539 (*semble*). See Andersen *v.* State, 43 Conn. 514.

Other jurisdictions, starting with the same "right and wrong" test, hold the view that the test is satisfied and the defendant excused if he acted because of an irresistible impulse, and not as a free agent. Com. *v.* Rogers, 7 Met. 500 (*supra*); Bovard *v.* State, 30 Miss. 600; Brown *v.* Com., 78 Pa. 122.

Still other jurisdictions discard altogether the "right and wrong" test, and hold that irresistible impulse is an excuse, though the knowledge of right and wrong existed. State *v.* Windsor, 5 Harr. 512; Dacey *v.* People, 116 Ill. 555; Plake *v.* State, 121 Ind. 433; State *v.* Felter, 25 Iowa, 67; Smith *v.* Com., 1 Duv. 224; Blackburn *v.* State, 23 Ohio St. 146; Dejarnette *v.* Com., 75 Va. 867.

The doctrine of the Alabama and New Hampshire courts, that there is no legal test of insanity, is stated in the case of Parsons *v.* State, 81 Ala. 577 (*supra*), following the opinion of Doe, J., in State *v.* Pike, 49 N. H. 399. See also People *v.* Finley, 38 Mich. 482.

SECTION II.

Intoxication.

PEARSON'S CASE.

CARLISLE ASSIZES. 1835.

[*Reported* 2 *Lewin*, 144.]

THE prisoner was indicted for the murder of his wife.

It was proved that in a fit of drunkenness he had beaten her in a cruel manner with a rake-shank, and that she died of the wounds and bruises which she received. His only defence was that he was drunk.

PARK, J. Voluntary drunkenness is no excuse for crime.

If a party be made drunk by stratagem or the fraud of another he is not responsible.

So drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation.

REGINA *v.* DOODY.

STAFFORD ASSIZES. 1854.

[*Reported* 6 *Cox C. C.* 463.]

THE prisoner was indicted for unlawfully attempting to commit suicide at Wolverhampton, on the 5th of March, 1854.

It appeared that the prisoner was at the George Inn, Wolverhampton, on the night of the 5th March, and about ten o'clock went to the water-closet. He was soon afterwards found there, suspended to a beam by a scarf tied round his neck. He was cut down, and animation restored. On being taken into custody and charged with the offence, he stated that he had led a bad course of life, and had no money or friends. He now said in his defence that he had been drinking for nine days before, and did not know what he was doing. There was some evidence to show that, although he was partially intoxicated, he was quite capable of taking care of himself.

WIGHTMAN, J., told the jury that the offence charged constituted, beyond all doubt, a misdemeanor at common law. The question for them to consider was whether the prisoner had a mind capable of contemplating the act charged, and whether he did, in fact, intend to take away his life. The prisoner alleged in his defence that he was drunk at the time, which must be taken to mean that he had no deliberate intention to destroy his life; for the mere fact of drunkenness in this, as in other cases, is not of itself an excuse for the crime, but it is a material fact in order to arrive at the conclusion whether or no the prisoner really intended to destroy his life.

Verdict, Guilty. Sentence, three months' imprisonment.

REGINA *v.* GAMLEN.

BRISTOL ASSIZES. 1858.

[*Reported* 1 *Foster and Finlason*, 90.]

ASSAULT. The charge arose out of an affray at a fair, and there seemed some ground for supposing that the prisoner acted under apprehension of an assault upon himself. All concerned were drunk.

CROWDER, J. Drunkenness is no excuse for crime; but in considering whether the prisoner apprehended an assault on himself, you may take into account the state in which he was. *Not guilty.*[1]

REGINA *v.* DAVIS.

NEWCASTLE ASSIZES. 1881.

[*Reported* 14 *Cox C. C.* 563.]

WILLIAM DAVIS, thirty-eight, laborer, was charged with feloniously wounding his sister-in-law, Jane Davis, at Newcastle, on the 14th day of January, with intent to murder her.

On the 14th day of January, 1881, the prisoner (who had been previously drinking heavily, but was then sober) made an attack upon his sister-in-law, Mrs. Davis, threw her down, and attempted to cut her throat with a knife. Ordinarily he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. At the police station he said: "The man in the moon told me to do it. I will have to commit murder, as I must be hanged." He was examined by two medical men, who found him suffering from *delirium tremens*, resulting from over-indulgence in drink. According to their evidence he would know what he was doing, but his actions would not be under his control. In their judgment neither fear of punishment nor legal nor moral considerations would have deterred him; nothing short of actual physical restraint would have prevented him acting as he did. He was disordered in his senses, and would not be able to distinguish between moral right and wrong at the time he committed the act. Under proper care and treatment he recovered in a week, and was then perfectly sensible.

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[1] *Acc.* Marshall's Case, 1 Lewin C. C. 76. But see Com. *v.* Hawkins, 3 Gray, 463. — ED.

For the defence it was submitted that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions.

STEPHEN, J., to the jury. The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions; and with regard to that I must explain to you what is the kind or degree of insanity which relieves a man from responsibility. Nobody must suppose — and I hope no one will be led for one moment to suppose — that drunkenness is any kind of excuse for crime. If this man had been raging drunk and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing, and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. If you think he was so insane that if his insanity had been produced by other causes he would not be responsible for his actions, then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment. Drunkenness is no excuse, but *delirium tremens* caused by drunkenness may be an excuse if you think it produces such a state of mind as would otherwise relieve him from responsibility. A person may be both insane and responsible for his actions, and the great test laid down in McNaghten's Case (10 Cl. & Fin. 200; 1 C. & K. 130 *n.*) was whether he did or did not know at the time that the act he was committing was wrong. If he did — even though he were mad — he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, — any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. *Delirium tremens* is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but different from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder or to do grievous bodily harm.

The jury returned a verdict of not guilty on the ground of insanity.

The prisoner was ordered to be detained during Her Majesty's pleasure.[1]

PEOPLE *v.* ROGERS.

COURT OF APPEALS OF NEW YORK. 1858.

[*Reported* 18 *New York*, 9.]

DENIO, J.[2] The principal exception to the judge's charge which is now relied on, relates to the consideration which should be given to the proof that the prisoner was intoxicated at the time of the homicide. The commission of crime is so often the attendant upon and the consequence of drunkenness, that we should naturally expect the law concerning it to be well defined. Accordingly we find it laid down as early as the reign of Edward VI. (1548), that "if a person that is drunk kills another, this shall be felony, and he shall be hanged for it. And yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." Plowden, 19. The same doctrine is laid down by Coke in the Institutes, where he calls a drunkard *voluntarius dæmon*, and declares that "whatever hurt or ill he doeth, his drunkenness doth aggravate it." 3 Thomas's Coke, 46. So in his Reports it is stated that "although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, — and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him." Beverley's Case, 4 Co. 125, *a.* Lord Bacon, in his "Maxims of the Law," dedicated to Queen Elizabeth, asserts the doctrine thus: "If a madman commit a felony, he shall not lose his life for it, because his infirmity came by the act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default." *Rule V.* And that great and humane Judge, Sir Matthew Hale, in his "History of the Pleas of the

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[1] *Acc.* U. S. *v.* McGlue, 1 Curt. 1; Beasley *v.* State, 50 Ala. 149; Fisher *v* State, 64 Ind. 435; Maconnehey *v.* State, 5 Ohio St. 77; State *v.* Robinson, 20 W. Va. 713. — ED

[2] Parts only of the opinions are given.

Crown," written nearly two hundred years ago, does not countenance any relaxation of the rule. "The third kind of *dementia*," he says, "is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary frenzy, and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness, answerable to the nature of the crime occasioned thereby, so that yet the primal cause of the punishment is rather the drunkenness than the crime committed in it; *but by the laws of England* such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." He states two exceptions to the rule: one where the intoxication is without fault on his part, as where it is caused by drugs administered by an unskilful physician; and the other, where indulgence in habits of intemperance has produced permanent mental disease, which he calls *fixed frenzy*. 1 Hale, 32. Coming down to more modern times, we find the principle insisted upon by the enlightened Sir William Blackstone. "The law of England," he says, "considering how easy it is to contract this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another." 4 Com. 26. A few recent cases in the English courts will show the consistency with which the rule has been followed down to our own times. In Burrow's Case (Lewin's Cr. C. 75, A. D. 1823) the prisoner was indicted for a rape, and urged that he was in liquor. Holroyd, J., addressed the jury as follows: "It is a maxim in law that if a man gets himself intoxicated, he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not answerable." A similar charge was given to the jury in the next case in the same book, where drunkenness was urged upon the trial of an indictment for burglary. Patrick Carroll was tried in 1835, at the Central Criminal Court, before a judge of the King's Bench and a judge of the Common Pleas, for the murder of Elizabeth Browning. It appeared that shortly before the homicide the prisoner was very drunk. His counsel, though he admitted that drunkenness could not excuse from the commission of crime, yet submitted that in a charge for murder, the material question being whether the act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated was a proper circumstance to be taken into consideration, and he referred to a case before Holroyd, J., reported in 2 Russell on Crimes 8, Rex *v.* Grindley, where that doctrine was laid down. Parke, J., in summing up, said: "Highly as I respect that late excellent judge, I differ with him, and my brother Littledale [the associate] agrees with me. He once acted on that case, but afterwards retracted his opinion, and there is no doubt that that case is not law. I think that there would be no safety for human life if it were considered as law." The prisoner was convicted and executed. 7 Carr. & Payne, 145. It would be easy to multiply citations of modern cases upon this doctrine; but it is unnecessary, as they all agree upon the main proposition, namely, that mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime. Rex *v.* Meakin, 7 Carr. & Payne, 297, and Rex *v.* Thomas, 7 id. 817, may be mentioned; and in this country, The United States *v.* Drew, 5 Mason C. C. R. 28, and The United States *v.* McGlue, 1 Curtis C. C. R. 1, will be found to maintain the principle upon the authority of Judge Story and Judge Curtis, of the Supreme Court of the United States. These last two cases are interesting, not only for stating the general principle, but for confirming the distinction laid down so long ago by Sir Matthew Hale, that where mental disease, or as he terms it a "fixed frenzy," is shown to be the result of drunkenness, it is entitled to the same consideration as insanity arising from any other cause. The first of them was a case of *delirium tremens*, and Judge Story directed an acquittal on that account. In the other the evidence left it doubtful whether the furious madness exhibited by the prisoner was the result of present intoxication, or of delirium supervening upon long habits of indulgence. This state of the evidence led Judge Curtis to state the rule and the exception with great force and clearness. In this state the cases of The People *v.* Hammell and The People *v.* Robinson, reported in the second volume of Judge Parker's Reports (pp. 223, 235), show the consistency with which the doctrine has been adhered to in our criminal courts and in the Supreme Court. The opinion in the last case contains a reference to several authorities to the same effect in the other states of the Union. Where a principle in law is found to be well established by a series of authentic precedents, and especially where, as in this case, there is no conflict of authority, it is unnecessary for the judges to vindicate its wisdom or policy. It will, moreover, occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.

Before proceeding to examine the judge's charge, it is necessary to state one other principle connected with the subject of intoxication. I am of the opinion that, in cases of homicide, the fact that the accused was under the influence of liquor may be given in evidence in his behalf. The effect which the evidence ought to have upon the verdict will depend upon the other circumstances of the case. Thus, in Rex *v.* Carroll, which was a case of murder by stabbing, there was not, as the court considered, any provocation on the part of the deceased, and it was held that the circumstance that the prisoner was intoxicated was not at all material to be considered. Rex *v.* Meakin was an indictment for stabbing with a fork, with intent to murder, and it was shown that the prisoner was the worse for liquor. Alderson, Baron, instructed the jury that, with regard to the intention, drunkenness might be adverted to according to the nature of the instrument used. "If," he said, "a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect upon the consideration of the malicious intent of the party." In Rex *v.* Thomas (for maliciously stabbing), the person stabbed had struck the prisoner twice with his fist, when the latter, being drunk, stabbed him, and the jury were charged that drunkenness might be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question in such cases is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion, it was said, is more easily excitable in a person when in a state of intoxication than when he is sober. So, it was added, where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse.

It must generally happen, in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct; and therefore I am of opinion that it would never be correct to exclude the proof altogether. That it would sometimes be right to advise the jury that it ought to have no influence upon the case, is, I think, clear from the foregoing authorities. In a case of lengthened premeditation, of lying in wait, or where the death was by poisoning, or in the case of wanton killing without any provocation, such an instruction would plainly be proper.

Harris, J. No rule is more familiar than that intoxication is never an excuse for crime. There is no judge who has been engaged in the administration of criminal law, who has not had occasion to assert it. Even where *intent* is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus, if a man, without provocation, shoot another or cleave him down with an axe, no degree of intoxication, short of that which shows that he was at the time utterly incapable of acting from *motive*, will shield him from conviction. This was, in substance, the doctrine which the jury received from the court in this case. The defendant had struck a blow with a deadly weapon, which had resulted in immediate death. To this act the law, without further proof, imputed guilty design. If the perpetrator would escape the consequences of an act thus committed, it was incumbent on him to show, either that he was incapable of entertaining such a purpose, or that the act was committed under provocation. In respect to the latter, there was nothing said by the court, nor any request to charge. Had it been contended that the blow was struck in the heat of passion, it might then have been proper to instruct the jury that, in determining this question, the intoxication of the defendant might well be considered. No such ground appears to have been taken by the counsel for the defence. There was, indeed, some testimony tending to show that the defendant had been struck before he committed the act for which he was tried. But the weight of the testimony is clearly against this theory of the case. It was no doubt judicious, therefore, for the defendant's counsel to refrain from asking the court to charge that the intoxication of the defendant might be considered by the jury in determining whether the blow was struck in the heat of passion, or with premeditated design. Had such a request been made, I think it would have been the duty of the court so to charge; though from the state of the testimony, it is not likely that the result would have been favorable to the defendant.

In the case now before us, there was no attempt to show that the act of killing was committed under the impulse of sudden passion. All that the court was requested to do was to instruct the jury that if they were satisfied that, by reason of intoxication, there was no intention or motive to commit the crime of murder, they should convict the defendant of manslaughter only. In refusing so to charge, there was no error. If, by this request, the counsel for the defendant meant, as the request seems to have been interpreted by the Supreme Court, that the jury should be instructed to take into consideration the intoxication of the defendant in determining the intent with which the homicide was committed, the proposition is not law. It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offence, if committed by a sober man, would be murder. If, on the other hand, it was intended that the court should instruct the jury that if, by reason of intoxication, the defendant was so far deprived of his senses as to be incapable of entertaining a purpose, or acting from design, the jury were so instructed. This was enough, unless the counsel for the defendant desired to have the jury decide whether the act was not committed in the heat of passion. In that case, his proposition must have been very differently framed.

Judgment of the Supreme Court reversed, and that of the General Sessions affirmed.

CHOICE *v.* STATE.

SUPREME COURT OF GEORGIA. 1860.

[*Reported* 31 *Georgia*, 424.]

LUMPKIN, J.[1] The sixth error alleged in the motion for a new trial is, because the judge failed to include in his charge to the jury the law on the material facts proven in the evidence and insisted on in the argument of counsel; and especially in failing to charge the jury whether the prisoner was or was not responsible for crime, if by reason of the injury to his brain *or otherwise* (mark that expression !)he was afflicted with the disease called *oinomania*, and by reason of this disease was irresistibly impelled, by a will not his own, to drink, and after being so impelled did drink, and thus became insane from drink, and while thus insane he committed homicide. The court also erred in not charging the jury that if they believed the prisoner had suffered by injury, *or otherwise* (mark that again !), a pathological or organic change in the brain, which produced the disease of *oinomania*, and by this disease was *irresistibly impelled* to drink liquor, and from the liquor thus drank became insane, and while thus insane killed deceased, he was not guilty of murder.

Whether any one is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it ever can be. And if it were, how far this crazy desire for liquor would excuse from crime, it is not for me to say. That this controlling thirst for liquor may be *acquired* by the force of habit, until it becomes a sort of second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immovably, and from it nothing can dislodge me but an Act of the Legislature; namely, that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be ingrafted upon criminal jurisprudence. It is neither more nor less than this, — that a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrong-doing. If this doctrine be true, — I speak it with all seriousness, — the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Ethiopian to change his skin as for them to cease to do evil, but the inability of Satan to control his will, to do right, is far beyond theirs; and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison-house of God's enemies. The fact is, responsibility depends upon the possession of will, — not the power over it. Nor does the most desperate drunkard lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught, that he takes it. His intellect, his appetite, and his will, all work rationally, if not wisely, in his guilty indulgence. And were you to exonerate the inebriate from responsibility, you would do violence both to his consciousness and to his conscience; for he not only feels the self-prompted use of every rational power involved in accountability, but he feels also precisely what this new philosophy denies, — his solemn and actual wrong-doing, in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, — just compose him, so as to reach his clear, constant experience, — and he will confess that he realizes the guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except where they were considered to have lost rectitude of intellect by direct mental alienation.[1]

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[1] Part of the opinion only is given.

STATE *v.* JOHNSON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1873.

[*Reported* 40 *Connecticut*, 136.]

CARPENTER, J.[2] The prisoner was indicted and on trial for murder in the first degree. As the homicide was not perpetrated by means of poison, or lying in wait, or in committing or attempting to commit any of the crimes enumerated in the statute, he could only be convicted of the higher offence by showing that it was a wilful, deliberate, and premeditated killing. A deliberate intent to take life is an essential element of that offence. The existence of such an intent must be shown as a fact. Implied malice is sufficient at common law to make the offence murder, and under our statute to make it murder in the second degree: but to constitute murder in the first degree, actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defence, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offence was in fact committed. I cite a few only of the many authorities which sustain this position. Keenan *v.* The Commonwealth, 44 Pa. 55; Roberts *v.* The People, 19 Mich. 401; Pigman *v.* The State, 14 Ohio, 555; State *v.* Garvey, 11 Minn. 154; Haile *v.* The State, 11 Humph. 154; Shannahan *v.* The Commonwealth, 8 Bush (Ky.), 463; Ray's Med. Jur. 5th ed. 566.[1]

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[1] See *accord* Flanigan *v.* People, 86 N. Y. 554. — ED.

[2] Part of the opinion only is given.

PEOPLE *v.* WALKER.

SUPREME COURT OF MICHIGAN. 1878.

[*Reported* 38 *Michigan*, 156.]

COOLEY, J.[2] The defendant was convicted in the court below for the larceny of a sum of money from one Martin. All the evidence in the case tended to show that if the defendant took the money wrongfully, it was while he was under the influence of liquor, and some of it indicated that he was very drunk.

The circuit judge was requested to charge the jury, that, "even if the jury should believe that defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the alleged offence, it is no excuse for him, and they should not take it into consideration. A man who voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences." This charge was given in reliance upon the general principle that drunkenness is no excuse for crime.

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[1] *Acc.* Hopt *v.* People, 104 U. S. 631; Cartwright *v.* State, 8 Lea, 376; Ferrell *v.* State, 43 Tex. 503; State *v.* Robinson, 20 W. Va. 713.

The same principle would seem to apply where it is desired to show that by reason of intoxication an intent to kill was absolutely lacking, and so to reduce the degree of a homicide to manslaughter. Reg. *v.* Doherty, 16 Cox C. C. 306. — ED.

[2] Part of the opinion only is given.

While it is true that drunkenness cannot excuse crime, it is equally true that when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny the crime does not consist in the wrongful taking of the property, for that might be a mere trespass; but it consists in the wrongful taking with felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed. This was fully explained by Mr. Justice Christiancy in Roberts *v.* People, 19 Mich. 401, and is familiar law. See also Nichols *v.* State, 8 Ohio St. 435; Regina *v.* Moore, 3 C. & K. 319.

The circuit court should be advised to set aside the verdict and grant a new trial.

The other justices concurred.[1]

SECTION III.

Coercion.

ANONYMOUS.

ASSIZES. 1352.

[*Reported Liber Assisarum*, 137 *pl.* 40.]

A WOMAN was arraigned for that she had feloniously stolen two shillings' worth of bread. She said that she did it by command of him who was at that time her husband. And the justices out of pity would not accept her confession, but took a jury; by which it was found that she did it by coercion of her husband, in spite of herself. Wherefore she was acquitted. And it was said that by command of a husband, without other coercion, there shall be no sort of felony, etc.[2]

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[1] See to the same effect the following cases: People *v.* Blake, 65 Cal. 275 (forgery); State *v.* Bell, 29 Ia. 316 (burglary); Roberts *v.* People, 19 Mich. 401 (assault with intent to kill); Pigman *v.* State, 14 Ohio, 555 (passing counterfeit money). — ED.

[2] When a wife commits a crime in her husband's presence, the presumption is that she acted by his coercion; and if so, she is excused. Reg. *v.* Price, 8 C. & P. 19; Com. *v.* Eagan, 103 Mass. 71; State *v.* Williams, 65 N. C. 398. This presumption may, however, be rebutted by proof that the wife did not act by the husband's coercion. U. S. *v.* Terry, 42 F. R. 317; Seiler *v.* People, 77 N. Y. 411; Uhl *v.* Com., 6 Gratt. 706; Miller *v.* State, 25 Wis. 384. The land of a wife who left the country with her husband was held not liable to confiscation under the "Absentee Act" in Martin *v.* Com., 1 Mass. 387. — ED.

ANONYMOUS.

CAMBRIDGE ASSIZES. 1664.

[*Reported Kelyng*, 31.]

IT was propounded to all the judges: If a man and his wife go both together to commit a burglary, and both of them break a house in the night, and enter and steal goods, what offence this was in the wife; and agreed by all, that it was no felony in the wife, for the wife being together with the husband in the act, the law supposeth the wife doth it by coercion of the husband. And so it is in all larcenies; but as to murder, if husband and wife both join in it, they are both equally guilty. Vid. 2 E. III.; F. Corone. 160; 27 Ass. pl. 40: F. Corone, 199; Poulton de Pace, 126, b; and the case of the Earl of Somerset and his lady, both equally found guilty of the murder of Sir Thomas Overbury, by poisoning him in the Tower of London [2 How. St. Tr. 951, 3 Co. Inst. 49].

M'GROWTHER'S CASE.

SURREY SPECIAL ASSIZES.[1] 1746.

[*Reported Foster C. L.* 13.]

IN the case of Alexander M'Growther, there was full evidence touching his having been in the rebellion, and his acting as a lieutenant in a regiment in the rebel army called the Duke of Perth's regiment. The defence he relied on was that he was forced in.

And to that purpose he called several witnesses, who in general swore that on the 28th of August the person called Duke of Perth, and the Lord Strathallan, with about twenty Highlanders, came to the town where the prisoner lived; that on the same day three several summonses were sent out by the Duke, requiring his tenants to meet him, and to conduct him over a moor in the neighborhood, called Luiny Moor; that upon the third summons the prisoner, who is a tenant to the Duke, with about twelve of the tenants, appeared: that then the Duke proposed to them that they should take arms and follow him into the rebellion; that the prisoner and the rest refused to go; whereupon they were told that they should be forced, and cords were brought by the Duke's party in order to bind them; and that then the prisoner and ten more went off, surrounded by the Duke's party.

These witnesses swore that the Duke of Perth threatened to burn the houses and to drive off the cattle of such of his tenants as should refuse to follow him.

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[1] Coram Lee, C. J., Willes, C. J., Wright and Foster, JJ., Reynolds and Clive, BB. Reported also 18 How. St. Tr. 391. — ED.

They all spake very extravagantly of the power lords in Scotland exercise over their tenants, and of the obedience (even to the joining in rebellion) which they expect from them.

Lord Chief Justice Lee, in summing up, observed to the jury that there is not, nor ever was, any tenure which obligeth tenants to follow their lords into rebellion.

And as to the matter of force, he said that the fear of having houses burnt or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels.

The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in Oldcastle's Case, that they joined *pro timore mortis, et recesserunt quam cito potuerunt.*

He then observed that the only force the prisoner pretends to was on the 28th of August; and that he continued with the rebels and bore a commission in their army till the surrender of Carlisle, which was on or about the 30th of December.

The jury without going from the bar found him guilty. But he was not executed.

N. B. All the judges that were in town were present, and concurred in the points of law.

REGINA *v.* DYKES.

MAIDSTONE ASSIZES. 1885.

[*Reported* 15 *Cox C C* 771.]

IN this case the two prisoners, who were husband and wife, were charged with highway robbery with violence.

The facts as proved in evidence clearly disclosed the felony charged in the indictment, but as regards the female prisoner there was some evidence to show that in what she had done, and in the violence which she had used against the prosecutor, she was acting under the compulsion of her husband, and in fear of violence from him.

H. F. Dickens, for the prosecution.

G. L. Denman, for the defence, submitted, on the authority of Reg. *v.* Torpey, 12 Cox C. C. 45, that there was no case to go to the jury as against the wife. And upon the learned judge ruling that it was for the jury to find whether upon the facts the wife had acted under the coercion of her husband or not, addressed the jury for the defence; and, while admitting that the male prisoner must be convicted, urged that the wife had really acted under the coercion of the husband.

The learned judge [STEPHEN, J.], in summing up, left the following questions to the jury: —

1. Were the prisoners individually guilty or not guilty? This question to be answered as if they were unmarried.

2. If both are found guilty, then as a matter of fact did the wife act under the compulsion of her husband?

The jury found both prisoners guilty, but also found that the wife had acted under the compulsion of the husband.

Upon this finding counsel for the defence claimed a verdict of not guilty in favor of the wife, quoting the case already cited, and also Reg. *v.* Woodward, 8 C. & P. 561.

After consideration the learned judge directed an acquittal to be entered for the wife, who was discharged.[1]

COMMONWEALTH *v.* DALEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888.

[*Reported* 148 *Massachusetts*, 11.]

C. ALLEN, J.[2] When a married woman is indicted for a crime, and it is contended in defence that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive, and it may be rebutted. And in order to raise this presumption it is also established that the husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate control or influence.

No exact rule applicable to all cases can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases. And where the wife did not act in the direct presence of her husband or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will independently of any coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist. Commonwealth *v.* Burk, 11 Gray, 437; Commonwealth *v.* Gannon, 97 Mass. 547; Commonwealth *v.* Welch, 97 Mass. 593; Commonwealth *v.* Eagan, 103 Mass. 71; Commonwealth *v.* Munsey, 112 Mass. 287; Commonwealth *v.* Gormley, 133 Mass. 580; Commonwealth *v.* Flaherty, 140 Mass. 454; Commonwealth *v.* Hill, 145 Mass. 305, 307.[1]

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[1] See Rex *v.* Buncombe, 1 Cox C. C. 183; People *v.* Wright, 38 Mich. 744.

"A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy-house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex." 1 Hawk. P. C. ch. 1, s. 12. See Reg. *v.* Williams, 10 Mod. 63; State *v.* Bentz, 11 Mo. 27. — ED.

[2] Part of the opinion only is given.

SECTION IV.

Infancy: Incorporation.

1 Hawk. P. C. ch. 1, s. 14. Neither a son nor a servant are excused the commission of any crime, whether capital or not capital, by the command or coercion of the father or master.[2]

REGINA *v.* SMITH.

SOMERSET ASSIZES. 1845.

[*Reported* 1 *Cox C. C.* 260.]

INDICTMENT for maliciously setting fire to a hayrick.

It appeared that the prisoner was a boy of the age of ten years. There was no evidence of any malicious intention.

ERLE, J. (to the jury). Where a child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of fourteen, he is presumed to be responsible for his actions as entirely as if he were forty; but between the ages of seven and fourteen, no presumption of law arises at all, and that which is termed a malicious intent, — a guilty knowledge that he was doing wrong, — must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of opinion he did fire it) he had a guilty knowledge that he was committing a crime *Not guilty.*[1]

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[1] Where a crime is committed by a wife in the absence of her husband there is no presumption of coercion, though coercion in fact may be shown. Com. *v.* Tryon, 99 Mass. 442; State *v.* Collins, 1 McCord, 355; State *v.* Potter, 42 Vt. 495. — ED.

[2] See Com. *v.* Mead, 10 All. 398; State *v.* Learnard, 41 Vt. 585. — ED.

COMMONWEALTH *v.* PROPRIETORS OF NEW BEDFORD BRIDGE.

Supreme Judicial Court of Massachusetts. 1854.

[*Reported* 2 *Gray*, 339.]

Indictment for a nuisance, occasioned by the erection and maintenance of a bridge in and across the Acushnet, a navigable river, flowing between the city of New Bedford and the town of Fairhaven, and thereby filling up and obstructing the navigation of the river. The indictment was found at June term, 1852, of the Court of Common Pleas.

At the trial in that court, before Byington, J., the defendants admitted that they had erected and maintained a bridge across the Acushnet River; that the bridge was so far an obstruction to the navigation of the river, that its erection and maintenance could only be justified under an act of the legislature; and that, without such justification, they would be subject to a prosecution of some kind. But they contended that they were not liable to indictment.

The defendants gave in evidence their act of incorporation (St. 1796, c. 19), under which they acted in maintaining their bridge.[2]

The presiding judge, "being of opinion that the several questions of law are so important or doubtful as to require the opinion of the Supreme Judicial Court," directed a verdict of guilty, and reported the case, with the consent of the defendants, for the consideration of this court.

Bigelow, J. The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground that a corporation, although liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, are not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are *dicta* in some of the early cases which sanction this broad doctrine, and it has been thence copied into text writers, and adopted to its full extent in a few modern decisions. But if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury or offences against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offences. Angell & Ames on Corp. ss. 394–396; Maund *v.* Monmouthshire Canal, 4 M. & G. 452, and 5 Scott N. R. 457; The Queen *v.* Birmingham & Gloucester Railway, 3 Q. B. 223; The Queen *v.* Great North of England Railway, 9 Q. B. 315, and 2 Cox C. C. 70; Eastern Counties Railway *v.* Broom, 6 Ex. 314; The State *v.* Morris & Essex Railroad, 23 N. J. (3 Zab.) 360. If, therefore, the defendants have been guilty of a nuisance, by obstructing unlawfully a navigable stream, an indictment may well be maintained against them. It may be added that the distinction between a non-feasance and a misfeasance is often one more of form than of substance. There are cases where it would be difficult to say whether the offence consisted in the doing of an unlawful act, or in the doing of a lawful act in an improper manner. In the case at bar, it would be no great refinement to say that the defendants are indicted for not constructing their draws in a suitable manner, and thereby obstructing navigation, which would be a non-feasance, and not for unlawfully placing obstructions in the river, which would be a misfeasance. The difficulty in distinguishing the character of these offences strongly illustrates the absurdity of the doctrine that a corporation are indictable for a non-feasance, but not for a misfeasance. See 9 Q. B. 325.[1]

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[1] See *acc.* Rex *v.* Owen, 4 C. & P. 236; Angelo *v.* People, 96 Ill. 209; State *v.* Fowler, 52 Ia. 103; State *v.* Adams, 76 Mo. 355; State *v.* Doherty, 2 Overton, 80.

Criminal capacity in a child between seven and fourteen may be proved by evidence, or may be inferred from the circumstances of the act. 4 Bl. Com. 23; Godfrey *v.* State, 31 Ala. 323; State *v.* Toney, 15 S. C. 409.

As to proof of criminal capacity, see Willet *v.* Com., 13 Bush, 230; Carr *v.* State, 24 Tex. App. 562.

As to the conclusive presumption that a boy under fourteen cannot be guilty of rape, except as principal in the second degree, see Rex *v.* Eldershaw, 3 C. & P. 396; Com. *v.* Green, 2 Pick. 380 (*supra*); Law *v.* Com., 75 Va. 885. — Ed.

[2] Part of the case has been omitted.

SECTION V.

Ignorance or Mistake.

1 Hale P. C. 42. Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any that is of the age of discretion and *compos mentis* from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do; *Ignorantia eorum quæ quis scire tenetur non excusat.*

But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary; and indeed many of the cases of misfortune and casualty mentioned in the former chapter are instances that fall in with this of ignorance: I shall add but one or two more.

It is known in war that it is the greatest offence for a soldier to kill, or so much as to assault his general; suppose, then, the inferior officer sets his watch, or sentinels, and the general, to try the vigilance or courage of his sentinels, comes upon them in the night in the posture of an enemy (as some commanders have too rashly done), the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence.[2]

LEVETT'S CASE.

NEWGATE SESSIONS. 1638.

[*Reported Croke Car.* 538.]

JONES said that it was resolved by the Chief Justice BRAMPTON, himself, and the Recorder of London, at the last sessions at Newgate, in the case of one William Levett, who was indicted of the homicide of a woman called Frances Freeman, where it was found by special verdict that the said Levett and his wife being in the night in bed and asleep, one Martha Stapleton, their servant, having procured the said Frances Freeman to help her about house-business, about twelve of the clock at night going to the doors to let out the said Frances Freeman, conceived she heard thieves at the doors offering to break them open; whereupon she, in fear, ran to her master and mistress, and informed them she was in doubt that thieves were breaking open the house-door. Upon that he arose suddenly and fetched a drawn rapier. And the said Martha Stapleton, lest her master and mistress should see the said Frances Freeman, hid her in the buttery. And the said Levett and Helen his wife coming down, he with his sword searched the entry for the thieves; and she, the said Helen, espying in the buttery the said Frances Freeman, whom she knew not, conceiving she had been a thief, crying to her husband in great fear, said to him, "Here they be that would undo us." Thereupon the said William Levett, not knowing the said Frances to be there in the buttery, hastily entered therein with his drawn rapier, and being in the dark and thrusting with his rapier before him, thrust the said Frances under the left breast, giving to her a mortal wound, whereof she instantly died; and whether it were manslaughter, they prayed the discretion of the court. And it was resolved that it was not; for he did it ignorantly without intention of hurt to the said Frances; and it was there so resolved.[1]

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[1] As to the criminal liability of members of a corporation who take part in its criminal acts, see Reg. *v.* Ry., 9 Q. B. 315, 327; People *v.* England, 27 Hun, 139. — ED.

[2] Here follows a statement of Levett's Case, *infra.* — ED.

REX *v.* BAILEY.

CROWN CASE RESERVED. 1800.

[*Reported Russell & Ryan,* 1.]

THE prisoner was tried before Lord ELDON, at the Admiralty Sessions, December, 1799, on an indictment for wilfully and maliciously shooting at Henry Truscott.[2]

It was insisted that the prisoner could not be found guilty of the offence with which he was charged, because the Act of the 39 Geo. III. c. 37, upon which (together with the statute relating to maliciously shooting, 9 Geo. I. c. 22, "Black Act") the prisoner was indicted at this Admiralty Sessions, and which act of the 39 Geo. III. is entitled "An act for amending certain defects in the law respecting offences committed on the high seas," only received the royal assent on the 10th of May, 1799, and the fact charged in the indictment happened on the 27th of June, in the same year, when the prisoner could not know that any such act existed (his ship, the "Langley," being at that time upon the coast of Africa.)

LORD ELDON told the jury that he was of opinion that he was, in strict law, guilty within the statutes, taken together, if the facts laid were proved, though he could not then know that the act of the 39 Geo. III. c. 37 had passed; and that his ignorance of that fact could in no otherwise affect the case than that it might be the means of recommending him to a merciful consideration elsewhere should he be found guilty.

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[1] See Regina *v.* Lynch, 1 Cox C. C. 361; McGehee *v.* State, 62 Miss. 772. — ED.

[2] Part of the case is omitted

On the first day of Hilary term, 1800, all the Judges (except MR. JUSTICE BULLER) met at LORD KENYON's chambers, and were of opinion that it would be proper to apply for a pardon, on the ground that the fact having been committed so short a time after the Act 39 Geo. III. c. 37 was passed, that the prisoner could not have known of it.[1]

REX *v.* HALL.

GLOUCESTER ASSIZES. 1828.

[*Reported* 3 *Carrington & Payne*, 409.]

INDICTMENT for robbing John Green, a gamekeeper of Lord Ducie, of three hare wires and a pheasant. It appeared that the prisoner had set three wires in a field belonging to Lord Ducie, in one of which this pheasant was caught, and that Green, the gamekeeper, seeing this, took up the wires and pheasant and put them into his pocket; and it further appeared that the prisoner soon after this came up and said, "Have you got my wires?" The gamekeeper replied that he had and a pheasant that was caught in one of them. The prisoner then asked the gamekeeper to give the pheasant and wires up to him, which the gamekeeper refused; whereupon the prisoner lifted up a large stick and threatened to beat the gamekeeper's brains out if he did not give them up. The gamekeeper, fearing violence, did so.

Maclean, for the prosecution, contended that by law the prisoner could have no property in either the wires or the pheasant, and as the gamekeeper had seized them for the use of the lord of the manor, under the statute 5 Anne c. 14, s. 4, it was a robbery to take them from him by violence.

VAUGHAN, B. I shall leave it to the jury to say whether the prisoner acted on an impression that the wires and pheasant were his property; for however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of opinion that the prosecution must fail. *Verdict, Not guilty*[1]

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[1] "Although proclamation be not made in the county, every one is bound to take notice of that which is done in parliament; for as soon as the parliament hath concluded anything, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm; and therefore it is not requisite that any proclamation be made, seeing the statute took effect before." — THORPE, C. J., in Y. B. 39 Edw. III. 7 (translation of Coke, 4 Inst. 26). See Brig Ann, 1 Gall. 62. — ED.

REX *v.* ESOP.

CENTRAL CRIMINAL COURT. 1836.

[*Reported 7 Carrington & Payne*, 456.]

THE prisoner was indicted for an unnatural offence, committed on board of an East India ship, lying at St. Katherine's Docks. It appeared that he was a native of Bagdad.

Chambers, for the prisoner. In the country from which the prisoner comes it is not considered an offence; and a person who comes into this country and does an act, believing that it is a perfectly innocent one, cannot be convicted according to the law of England. A party must know that what he does is a crime. This is the principle upon which infants, idiots, and lunatics are held not to be answerable. If a person is unconscious that he is doing a wrong act, or believes that it is a right or innocent act, he is exonerated. Where one man kills another under the persuasion that he is doing a good action, he is not liable to punishment, for he knows not the distinction between right and wrong, and upon that point is insane.

BOSANQUET, J. I am clearly of opinion that this is no legal defence.

VAUGHAN, J. Where is the evidence that it is not a crime in the prisoner's own country? But if it is not a crime there, that does not amount to a defence here. Numbers have been most improperly executed if it is a defence.

The prisoner, after the examination of some witnesses on his behalf, from whose statements it appeared that the witnesses for the prosecution acted under the influence of spite and ill will, was found *Not guilty.*[2]

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[1] "Ignorance of the law cannot excuse any person; but at the same time, when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person take what he believes to be his own, it is impossible to say that he is guilty of felony." — COLERIDGE, J., in Reg. *v.* Reed, C. & M. 306. See Reg. *v.* Hemmings, 4 F. & F. 50; Com. *v.* Stebbins, 8 Gray, 492. — ED.

[2] See *acc.* Barronet's Case, 1 E. & B. 1. — ED.

ANONYMOUS.

WESTERN CIRCUIT. 17—.

[*Reported Foster C. L.* (3*d ed.*) 439.]

A WIDOW WOMAN was indicted on the statute 9 and 10 W. III. c. 41, for having in her custody divers pieces of canvas marked with his Majesty's mark in the manner described in the Act, she not being a person employed by the commissioners of the navy to make the same for his Majesty's use.

The canvas was produced at the trial marked as charged in the indictment, and was proved to the satisfaction of the court and jury to be of that sort which is commonly made for the use of the navy and to have been found in the defendant's custody.

The defendant did not attempt to show that she was within the exception of the Act, as being a person employed to make canvas for the use of the navy; nor did she offer to produce any certificate from any officer of the Crown touching the occasion and reason of such canvas coming into her possession.

Her defence was that when there happened to be in his Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons intrusted with the stores to make a public sale of them in lots larger or smaller as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table-linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant, and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen.

This sort of evidence was strongly opposed by the counsel for the Crown, who insisted that, as the Act allows of but one excuse, the defendant, unless she can avail herself of that, cannot resort to any other; for if the canvas was really bought of the commissioners or of persons acting under them, which is the only excuse pointed out by the statute, why was no certificate of that matter taken at the time of the purchase, since the fourth section of the Act admits of that excuse, and the second section admits of no other?

But the judge [FOSTER, J.] was of opinion that, though the clause of the statute which directs the sale of these things hath not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seems to exclude any other excuse for those in whose custody they shall be found; yet still the circumstances attending every case which may seem to fall within the Act ought to be taken into consideration; otherwise a law calculated for wise purposes may, by too rigid a construction of it, be made a handmaid to oppression. There is no room to say that this canvas came into the possession of the defendant by any act of her own. It was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of this kind have been frequently exposed to public sale; and though the Act points out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities have been purchased at one sale, have used the caution suggested to them by the Act. And if the defendant's husband really bought this linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after this length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury, and directed them that if, upon the whole of the evidence, they were of opinion that the defendant came to the possession of the linen without any fraud or misbehavior on her part, they should acquit her; and she was acquitted.

REGINA *v.* TINKLER.

NORFOLK CIRCUIT. 1859.

[*Reported* 1 *Foster & Finlason*, 513.]

THE prisoner was indicted, under the 9 Geo. IV., c. 31, s. 20, for unlawfully taking one Sarah Thompson, she being then unmarried, and under the age of sixteen years, out of the possession and against the will of Jane Barnes, her lawful guardian.

It appeared that the prisoner, who was a widower, had married the elder sister of Sarah Thompson, and up to the time of his wife's death, Sarah Thompson, who was an orphan, had lived in the prisoner's house. On that occasion, Mary Johnson, another married sister of Sarah Thompson, caused her to be placed under the care of Jane Barnes.

No improper motive was alleged against the prisoner, he having asserted, as his reason for taking the child away, that he had promised her father, on his deathbed, to take care of her.

The CHIEF JUSTICE [COCKBURN] told the jury that it was clear the prisoner had no right to act as he had done in taking the child out of

Mrs. Barnes's custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then although the prisoner was not legally justified, he would be entitled to an acquittal upon this charge.[1]

The jury found the prisoner not guilty.

REGINA *v.* TOWSE.

EXETER ASSIZES. 1879.

[*Reported* 14 *Cox C. C.* 327.]

PRISONER was indicted for having set fire to some furze growing on a common at Culmstock.[1]

It appeared from the evidence that persons living near the common had occasionally burnt the furze to improve the growth of the grass, although the existence of any right to do this was denied.

But the prisoner in this case denied having set the furze on fire at all.

Bullen, for the defence, contended that even if it were proved that the prisoner set the furze on fire she could not be found guilty if it appeared that she *bona fide* believed she had a right to do so, whether the right were a good one or not.

LOPES, J. If she set fire to the furze thinking she had a right to do so that would not be a criminal offence. I shall leave two questions to the jury. 1. Did she set fire to the furze? 2. If yes, did she do it wilfully and maliciously?

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[1] "Whosoever shall unlawfully and maliciously set fire to any . . . furze or fern, wheresoever the same may be growing, shall be guilty of felony." 24 & 25 Vict. c. 97, s. 16. — ED.

COMMONWEALTH *v.* THOMPSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 6 *Allen*, 591.]

INDICTMENT for adultery with Emeline B. Carlton.

At the trial in the Superior Court, before ROCKWELL, J., it appeared that in November, 1861, the defendant was married to said Emeline, and lived with her as his wife thereafter. The defendant contended on the evidence which was offered that he then believed her to be a widow, and that she had no knowledge that her former husband was alive, and had not seen or heard from him for eleven years; and he asked the court to instruct the jury that if he married and cohabited with her without any knowledge that she had a husband living, and believing that she had no husband living, such cohabitation would not amount to the crime of adultery, even if her husband was not dead. The judge refused to give these instructions, but instructed the jury that if they were satisfied that the intercourse took place as alleged, it would be adultery if the former husband was still living, although the defendant had no knowledge or belief that he was alive; and he excluded the evidence which was offered.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. F. Verry, for the defendant.

Foster, Attorney-General, for the Commonwealth.

DEWEY, J. The court properly refused to rule that upon the mere showing that the defendant married the said Emeline B. Carlton and cohabited with her without any knowledge that she had a husband living, and believing that she had no husband living, the defendant could not be convicted of adultery, although she then had a legal husband in full life.

The objection urged in behalf of the defendant, that to make any act criminal there must be a criminal intent, will not screen the guilty party under such circumstances. Commonwealth *v.* Mash, 7 Met. 474.

This would dispose of the case but for the facts which were offered to be proved, that the husband had been absent from his wife for eleven years preceding the time when the acts complained of took place, and that his wife had not seen or heard of him during that period, and had no knowledge that he was alive.

It is a well settled rule of law that, upon a person's leaving his home for temporary purposes of business or pleasure, and not being heard of or known to be living for the term of seven years, the presumption arises of his death. 2 Stark. Ev. (4th Amer. ed.) 458. Loring *v.* Steineman, 1 Met. 211. Although this is merely a presumption authorized by law, and may be controlled by evidence showing that the fact was otherwise, yet in reference to acts of other parties, and in deciding whether they are criminal, this presumption is allowed to have its proper effect. Thus in reference to the criminal intercourse alleged to have taken place between Mrs. Carlton and the defendant, supposing she had been indicted for polygamy, and the fact had appeared of the absence of her husband for eleven years, she not knowing him to be living during that time, this would constitute a legal defence to the criminal charge. Gen. Sts. c. 165, § 5. We think this statute, though not in terms applicable to an indictment for adultery, recognizes a rule that should operate as a legal defence to the charge of adultery, when the alleged criminal acts are the marrying and cohabiting with a woman whose husband had been absent more than seven years, and not known to the defendant to have been alive during that period.

The proper instructions to the jury in a case like the present would be, that if it appeared that the husband had absented himself from his wife, and remained absent for the space of seven years together, a man who should, under the existence of such circumstances, and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such acts be criminally punishable for adultery, although it should subsequently appear that the former husband was then living.

Exceptions sustained.[1]

STATE *v.* GOODENOW.

SUPREME JUDICIAL COURT OF MAINE. 1876.

[*Reported* 65 *Maine*, 30.]

PETERS, J.[2] The respondents are jointly indicted for adultery, they having cohabited as husband and wife while the female respondent was lawfully married to another man who is still alive. The only question found in the exceptions is, whether the evidence offered and rejected should have been received. This was, that the lawful husband had married again, and that the justice of the peace who united the respondents in matrimony advised them that, on that account, they had the right to intermarry, and that they believed the statement to be true, and acted upon it in good faith. It is urged for the respondents that those facts would show that they acted without any guilty intent. It is undoubtedly true that the crime of adultery cannot be committed without a criminal intent. But the intent may be inferred from the criminality of the act itself. Lord Mansfield states the rule thus: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent."

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[1] On a new trial it appeared that Emeline B. Carlton had herself left her husband, of whom she had not thereafter heard for eleven years. As the exception in the statute (Gen. Stats. c. 165, § 5) did not cover the case, defendant was found guilty, and the conviction upheld. 11 All. 23. — ED.

[2] The opinion only is given ; it sufficiently states the case.

Here the accused have intentionally committed an act which is in itself unlawful. In excuse for it, they plead their ignorance of the law. This cannot excuse them. Ignorance of the law excuses no one. Besure, this maxim, like all others, has its exceptions. None of the exceptions, however, can apply here. The law, which the respondents are conclusively presumed to have known, as applicable to their case, is well settled and free of all obscurity or doubt. It would perhaps be more exact to say, they are bound as if they knew the law. Late cases furnish some interesting discussions upon this subject. Cutter *v.* State, 36 New Jer. 125; United States *v.* Anthony, 11 Blatch. 200; United States *v.* Taintor, id. 374; 2 Green's Crim. Law R. 218, 244, 275, 589; Black *v.* Ward, 27 Mich. 191; s. c. 15 Amer. Law Reports, 162 and note, 171. The rule, though productive of hardship in particular cases, is a sound and salutary maxim of the law. Then the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice. They were bound to know or ascertain the law and the facts for themselves at their peril. A sufficient criminal intent is conclusively presumed against them, in their failure to do so. The facts offered in proof may mitigate, but cannot excuse, the offence charged against them. There is no doubt that a person might commit an unlawful act, through mistake or accident, and with innocent intention, where there was no negligence or fault or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was a criminal heedlessness on the part of both of the respondents to do what was done by them. The Massachusetts cases cited by the counsel for the state, go much further than the facts of this case require us to go in the same direction, to inculpate the respondents. Besides those cases, see also Commonwealth *v.* Elwell, 2 Met. 190; Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Goodman, 97 Mass., 117; Commonwealth *v.* Emmons, 98 Mass. 6. We see no relief for the respondents except, if the facts warrant it, through executive interposition.

Exceptions overruled.[1]

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[1] See U. S. *v.* Anthony, 11 Blatch. 200; U. S. *v.* Taintor, 11 Blatch. 374; U. S. *v.* Adams, 2 Dak. 305. — ED.

SECTION VI.

Impossibility.

REGINA *v.* BAMBER.

QUEEN'S BENCH. 1843.

[*Reported* 5 *Queen's Bench,* 279.]

LORD DENMAN, C. J.[1] I think the defendant below is entitled to judgment. Both the road which the defendant is charged with liability to repair and the land over which it passes are washed away by the sea. To restore the road, as he is required to do, he must create a part of the earth anew. I do not rely much upon the argument that the ancient line of highway has been removed. But here all the materials of which a road could be made have been swept away by the act of God. Under those circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition, and none has been found.

THE BRIG WILLIAM GRAY.

CIRCUIT COURT OF THE UNITED STATES. 1810.

[*Reported* 1 *Paine,* 16.]

LIVINGSTON, J. In defence of the libel filed against this vessel for proceeding from the United States to the island of Antigua, contrary to the act laying an embargo, and the first act in addition thereto, the claimant alleges that while on a voyage from Alexandria to Boston, she was driven by storms, tempests, stress of weather, and necessity, out of her course, and forced to proceed to that island for her own preservation and that of the cargo, and of the lives of the persons on board.

Both the fact and the legal consequences deduced from it by the appellant are denied by the counsel for the United States.

In looking at the testimony, it cannot be denied that there is every reason to believe that the real destination of the *William Gray* was Boston. Two witnesses swear to this fact positively, and she had actually arrived at Martha's Vineyard on that voyage. Why it was not completed is very minutely accounted for. An attempt was made to reach Boston, but the inclemency of the season, the frozen and mutilated condition of several of the hands, and the wrecked state of the brig, are assigned as reasons for not being able to effect this purpose. In this state of things it appears to have been unanimously thought necessary for the preservation of life, and on the advice of the pilot, to bear away for the West Indies, it being deemed impossible to return to any port on the continent of America. What the pilot advised to be done is a matter of fact, and may be proved as such by any witness. Such advice or conduct on his part cannot be classed, as has been done, with hearsay testimony. To this body of evidence the Court is desired to oppose its own opinion as to the practicability of arriving at some one or other port within the United States. It is certain that a story may be so very improbable that although attested to by more than one credible witness, no one would be bound to believe it. But this is not of that description, although it does appear to the Court somewhat extraordinary that a vessel so near the continent, and in so high a latitude, should not be able to make some part of it; yet, for aught it can know to the contrary, vessels quite as near, if not nearer, may have been blown off in the winter season, especially if in a shattered order, to the West Indies. It would, therefore, be unpardonable in either a jury or a Court, merely because a fact appears somewhat improbable, to disregard the evidence establishing it, and to decide in conformity with its own opinion, unassisted by that of professional men, in the face of all the proofs in the cause.

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[1] The opinion only is given ; it sufficiently states the case.

In the judgment of this Court, then, the alleged necessity is sufficiently made out. Whether it takes the case out of the statute is next to be considered. Were this *res integra*, the very able argument on behalf of the United States would be entitled to the most respectful consideration. It is perhaps to be lamented that judges ever permitted themselves to make any exceptions to an act which the legislature itself had not thought proper to incorporate within the body of it. The latitude which has been assumed in this way has very much added to the uncertainty of the written law of the land, and produced much litigation, which a firm adherence to its letter would have prevented. But it is too late for speculations of this kind. Their only use can be to make Courts careful, and they cannot be too much so, never to depart, under the idea of preventing a particular hardship, from the plain and obvious meaning of the legislature. This restriction, which every judge should impose on himself, is not transcended when, in the interpretation of penal statutes, any principle is applied which is found in every code of laws, divine or human, and has from time immemorial been ingrafted into the common law of the country, from which our jurisprudence is borrowed. Where such rules or principles exist and have invariably and on all occasions governed Courts in the administration of criminal justice, they become as much a part of the law, and are as obligatory on a Court as the statute which it may be called on to expound. Of this kind is the one of which the appellants now claim the benefit; that the concurrence of the will in what is done, where it has a choice, is the only thing that renders a human action culpable, or, in other words, that to make a complete offence there must be both a will and an act. This axiom, as it may be termed, is applied as well to offences created by statute as to those which are such at common law. The variety of cases in which this absence of will excuses those who would otherwise be offenders have been mentioned in the course of the argument, and among them we find that on which this defence proceeds, namely, an act which proceeds from compulsion and inevitable necessity. Whether the legislature might not by apt words punish an act taking place under such circumstances is foreign from the present inquiry; but where this is not done in terms, they are supposed to know that, by the rules of the common law, it is always considered as excepted, and therefore do not make the exception themselves. The cases which have been produced by the appellant are as strong and conclusive as perhaps were ever submitted to a Court in support of any proposition of law. If the necessity which leaves no alternative but the violation of law to preserve life be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venial an offence which is only *malum prohibitum*, and the commission of which is attended with no personal injury to another. The Court, therefore, cannot but yield to the weight of so many authorities, especially, too, when every decision accords with reason, common sense, and the feelings of mankind, which are universal and indelible.

But is it so very clear that the law itself does not make the exception? The Court is inclined to think that, on a fair comparison of the different acts with each other, this will be found to be done. The legislature, by some of the provisions of the enforcing law, as it is called, certainly appear to have been of the same opinion.

The Court, therefore, thinks that the necessity which is proved to have existed excused the party from all guilt, and of course from the forfeiture which is sought; and that none having accrued, it is not among those cases which are referred for mitigation to the Secretary of the Treasury.

The sentence of the District Court must accordingly be reversed.

COMMONWEALTH *v.* BROOKS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported* 99 *Massachusetts*, 434.]

COMPLAINT for the violation of s. 34 of an ordinance of the city of Boston relating to carriages, which section is printed in the margin.[1]

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[1] "No owner, driver, or other person having the care or ordering of any chaise, carryall, hackney carriage, truck, cart, waggon, handcart, sleigh, sled, handsled, or any

(Laws and Ordinances of Boston, ed. 1863, p. 106) in suffering the defendant's wagon to stop in South Market Street in Boston more than twenty minutes.[1]

Gray, J. It is very clear that the defendant was not proved to have violated the city ordinance on which he was prosecuted. No person transgresses the ordinance, who does not voluntarily suffer his vehicle to stop in the street for more than twenty minutes. The defendant, indeed, drove into South Market Street more than twenty minutes before four o'clock, and intended to remain in that street until four o'clock. But he had the right to travel in the street, if he did not voluntarily suffer his vehicle to stop in it for the prohibited period. If he had arrived on his stand more than twenty minutes before four o'clock and voluntarily remained there with his wagon until that hour, or if he had voluntarily stopped his wagon for more than twenty minutes at any other place in the street, it would have been a violation of the ordinance. So, perhaps, if he had stopped for more than twenty minutes in all in two places near each other, in the execution of one purpose. But it is unnecessary in this case to consider under what circumstances repeated intermissions of travel, or time spent in driving about the street without intention of moving onward towards a particular destination, might be treated as going to make up one stopping, within the meaning of the ordinance; for it appears that the defendant, while driving his wagon through the street towards his stand, was delayed by the crowding of other vehicles which he could not control for five or six minutes, and then drove on and occupied his stand. He did not voluntarily stop at all before arriving at his stand; he did not stop on his stand but fifteen minutes before four o'clock; and after four o'clock, being a marketman, engaged in bringing vegetables into the city and selling them from his wagon at a stand occupied by him within the established limits of the market, though in a public street, he is admitted to have had a right, by virtue of the exception in the ordinance, and of the St. of 1859, c. 211, to be and remain upon his stand with his wagon. *New trial ordered.*

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other vehicle whatsoever, new or old, finished or unfinished, with or without a horse or horses, or other animal or animals harnessed thereto, shall suffer the same to stop in any street, square, lane, or alley of this city more than five minutes, without some proper person to take care of the same, or more than twenty minutes in any case; and any person so offending shall be liable to a fine of not less than three, nor more than twenty dollars for each offence. But this section shall not apply to the carriages of physicians while visiting the sick, or to the vehicles of market and provision men, who may stand with the same, without the limits of Faneuil Hall Market, until eleven o'clock in the forenoon, at such places in the city as the board of aldermen may designate, for the purpose of vending provisions."

[1] The evidence is omitted.

SECTION VII.

Custom.

ANONYMOUS.

COMMON PLEAS.

[*Reported* 2 *Leon.* 12.]

MANWOOD, J., said: When I was servant to Sir James Hales, one of the Justices of the Common Pleas, one of his servants was robbed at Gads Hill, within the Hundred of Gravesend in Kent, and he sued the men of the Hundred upon this statute,[1] and it seemed hard to the inhabitants there that they should answer for the robberies done at Gads Hill, because robberies are there so frequent that if they should answer for all of them, that they should be utterly undone. And *Harris*, Sergeant, was of counsel with the inhabitants of Gravesend, and pleaded for them, that time out of mind, etc., felons had used to rob at Gads Hill, and so prescribed, and afterwards by award they were charged.

REGINA *v.* REED.

SUSSEX ASSIZES. 1871.

[*Reported* 12 *Cox C. C.* 1.]

THE indictment stated that the defendants did unlawfully and indecently expose their bodies and persons naked and uncovered in presence of divers of her Majesty's subjects, to their great scandal, and to the manifest corruption of their morals; and, second count, that the defendants on a certain public and common highway, in the parish of Appledown, unlawfully and indecently did expose their bodies and persons naked and uncovered in the presence of divers subjects then and there being, and within sight and view of divers others passing and repassing in the highway, to the common nuisance of the subjects of the Queen.

The defendants pleaded not guilty.

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[1] Statute of Winchester, 13 Edw. 1.

Hawkins, Q. C., and *Grantham*, for the prosecution.

Willoughby and *A. L. Smith*, for the defendants.

Hawkins, in opening the case, cited Rex *v.* Crowden, 2 Camp. N. P. C. 89, where a defendant was convicted of indecency in bathing at Brighton in view of houses recently erected. Although in the present case it was not alleged that the bathing was within view of the houses, it was urged that, as it was on a public pathway, it was the same case in point of principle.

It appeared that the bathing took place in the sea, at a spot about two miles from Chichester, and half a mile from the nearest dwelling-house, at the mouth of the Levant, a stream flowing from Chichester, and where the water was deeper than elsewhere on that part of the coast. The bathing-place was on a public footway from Chichester, on a bank or sea-wall along the beach. The side of the bank next to the sea, as it was a sea-wall, was not accessible as a place for dressing and undressing, and so the bathers dressed and undressed on the land side of the path. Hence they passed naked to and from the sea across the path; and it was proved that as many as eighteen or twenty women passed along the footpath in the course of a day, and that sometimes they had to turn back in order to avoid the bathers. The bathing took place, not merely in the morning and evening, but in the afternoon, at the time women were walking along the path. Moreover, as the bank was five or six feet high, the bathers, when on the path, were seen at some distance.

It was proved that bathing went on at the time women were passing, and that sometimes they had to turn back. The pathway was, it was stated, one of the most pleasant walks round Chichester, and a good deal frequented by ladies, especially in that season of the year when bathing went on; and the prosecutor, Mr. Stanford, whose house was within half a mile of the bathing-place, stated that the bathers could be seen from some of the windows of his house and from his garden. But it did not appear that complaints had been made until the prosecutor purchased the house about two years ago, and it also appeared that there was another house nearer than his, and that the inhabitants did not complain, the nearest house being above a quarter of a mile from the bathing-place. Further, it appeared that for more than half a century bathing had taken place there without any complaint, and that there had not been on the part of any of the defendants any exposure beyond what was necessarily incident to bathing. Nevertheless, it appeared that the pathway from which the bathing took place was one of the most pleasant walks in the neighborhood of Chichester, and that it was practically closed to females during the bathing season, which was, of course, the finest portion of the year.

Cockburn, C. J. If the place where the bathing went on was a place where persons could not bathe without indecent exposure, it was a place where bathing ought not to go on. Undoubtedly, if it was a place where people rarely passed, and where there was no necessity for passing at all, it would be a material element in the case. But the mere fact that bathing could not go on in the place without exposure was not enough to excuse the exposure, and was rather a reason why the bathing ought not to go on. Upon these facts it was quite impossible that the defendants could resist a conviction upon this indictment. There was, it appeared, a public footway frequented in fine weather by the inhabitants of Chichester, and which must be taken to be an ancient and accustomed footway. It was impossible to set up a customary right to bathe close to the path in such a way as to violate public decency, and thus to be inconsistent with the use of the footway by any of the Queen's subjects, especially of the female sex. No one could suppose that respectable women could frequent the footpath where men were in the habit of bathing, and were constantly seen in a state of nudity. It was clear, therefore, that the usage so to bathe, however long it might have existed, could not be upheld, and that those persons who thus exposed themselves upon or near to a public footway were liable to be indicted for indecency. There must, if the prosecution was pressed, be a verdict of guilty upon this indictment, unless the facts as thus shown in evidence could be altered.

It was not suggested for the defence that the facts could be altered.

Hawkins, for the prosecution, stated that it was not desired to press the prosecution, if protection for the future could be secured, and thereupon it was agreed between the parties that bathing henceforth should take place from a shed to be erected for the purpose, and on this condition the jury were discharged.[1]

BANKUS *v.* STATE.

SUPREME COURT OF INDIANA. 1853.

[*Reported* 4 *Ind.* 114.]

PERKINS, J. Indictment for a riot. Jury trial, conviction, motion for a new trial overruled, and judgment against the defendants.

The bill of exceptions in the case states the substance of the evidence given as follows: "Jesse Bankus, Lewis Simpson, William Woods, and William McShirely, four of the defendants, were on trial, and three witnesses were examined on the part of the state (one of whom was engaged in the alleged riot with the defendants), whose testimony tended to prove that on a certain evening, within a year before the finding of said indictment, at the county of Henry, the above-named defendants were at a certain place in said county, called Chicago, (there being no evidence to prove that they had assembled at said place by previous concert or arrangement, for any purpose whatever, except the facts that they were all present without any known business, and that they lived in different parts of the neighborhood); that there had been an infair at the house of one Jacob Wise, in said Chicago, whose house was situated on or near the public highway; that the defendants, with one exception, were young men, one of whom went to a neighboring house and borrowed a horn, with which they marched back and forth along the highway, sometimes blowing said horn and singing songs, but not vulgar ones, before the house of said Wise, and north and south of it, and hallooed so that they could be heard near a mile distant, as certain persons, not witnesses, had informed said Wise; and that they continued on the ground, thus acting, till one or two o'clock in the morning. But said witnesses all concurred in stating that the defendants were all in good humor, and used no violence further than above set forth; that they had no guns or weapons of any kind, made no threats or attempts at force of any kind; that the witnesses were not in the least alarmed, and feared no danger of any kind, and were in no way disturbed, except that Jacob Wise stated that he went to bed about nine o'clock, and was awakened occasionally by the hallooing in the road, and that a pedler, who put up at the house of said Wise that night (it being a public house), inquired if there were a lock and key to the stable in which his horses were kept; and that said Wise, at the instance of said pedler, locked the stable;" which was all the testimony given in the cause.

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[1] *Acc.* Com. *v.* Perry, 139 Mass. 198

The question is, whether, upon the foregoing evidence, the jury were authorized to find the defendants guilty of a riot.

The R. S. of 1843 enact, p. 973, that "if three or more persons shall actually do an unlawful act of violence, either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot." The R. S. of 1852, vol. 2, p. 425, thus define a riot: "If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot."

A great noise in the night-time, made by the human voice or by blowing a trumpet, is a nuisance to those near whom it is made. The making of such a noise, therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is, by the statute of 1843, a riot. All these facts exist in the present case. Here was a great noise, heard a mile, in the night-time, made with human voices and a trumpet, in the vicinity of inhabitants. The requirements of the statute for the making out of the offence are filled. The noise was also made tumultuously. The act itself involves tumultuousness of manner in its performance. But it is said, here was no alarm or fear. The statute defining the offence says nothing about alarm or fear. In this case, however, it was only the witnesses who were not alarmed. Others within the distance of the mile in which the noise was heard, and who were not present to observe the actual condition of things, may have been, and doubtless were, alarmed; and the pedler was afraid his horses would be stolen.

It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption. But with what motive were they performing these good-humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a charivari, which Webster defines and explains as follows: "A mock serenade of discordant music, kettles, tin-pans, etc., designed to annoy and insult. It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult."

Again, it is urged that these defendants were but acting in accordance with the custom of the country. But a custom of violating the criminal laws will not exempt such violation from punishment. In the case of The State of Pennsylvania *v.* Lewis, et al., Add. R. 279, it appeared that on the 5th of November, 1795, there was a wedding at the house of one John Weston. The defendants in said case were there without invitation, were civilly treated, and, in the evening, when dancing commenced, began a disturbance in which, during the evening, Weston was so seriously injured that, on the third day after, he died. On the trial of the indictment against said defendants, Campbell, Pentecost, and Brackenridge, in their argument, said, "These men did nothing more than an usual frolic, according to the custom and manners of this country. There was no intention of hurt, no design of mischief, in which the malice, which is a necessary ingredient of murder, consists." But the argument did not prevail; and the Court said, "If appearance of sport will exclude the presumption of malice, sport will always be affected to cover a crime." The defendants were convicted of murder in the second degree.

The case before us we regard as a plain, but not an aggravated, one of riot, and the judgment below must be affirmed. The defendants were fined but three dollars each. The judgment is affirmed with costs

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VICK *v.* STATE.

COURT OF CRIMINAL APPEALS OF TEXAS. 1902.

[*Reported* 69 *Southwestern Rep.* 156]

BROOKS, J.[1] Appellant was prosecuted under an information charging the theft of a load of wood. Upon conviction, his punishment was assessed at a fine of $5 and one hour's confinement in the county jail. . . .

Appellant also complains that the court erred in not charging the jury as to the custom of people to go into the pastures and take wood from parties owning the pastures. There is no law authorizing thieving by custom. This testimony was not admissible. . . .

The judgment is affirmed.

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[1] Only so much of the case as discusses the defence of custom is given. — ED.

HENDRY *v.* STATE.

SUPREME COURT OF FLORIDA. 1897.

[*Reported* 39 *Fla.* 235.]

MABRY, J. The plaintiff in error was indicted, tried and convicted of the larceny of cows, the property of one Adam Mercer, and sentenced to the penitentiary for one year. Two assignments of error are insisted on for a reversal of the judgment; the first being the rejection of certain testimony sought to be elicited by plaintiff in error from the witness, Ziba King, and the second, relating to the sufficiency of the evidence to sustain the verdict.

Ziba King, testifying for the prosecution, stated that he ran a butcher shop at Punta Gorda, and that some time in May, 1894, defendant delivered to him at his butcher shop in DeSoto county about nineteen head of cattle, and among them were six or seven in the mark and brand of Adam Mercer; that witness knew the mark and brand of Mercer, and defendant stated at the time of the delivery of the cattle that he was authorized to sell them. Witness bought the cattle from defendant and paid him for seventeen head, most of which were butchered. On cross-examination of this witness, after stating that he had been extensively engaged in the cattle business for twenty-five years, and was familiar with the rules and customs of stock men in DeSoto county, the following question was propounded, viz.: You have stated that you have been extensively engaged in the cattle business in this county for twenty-five years, and that you are familiar with the rules and customs of stock men, please state whether or not it has been the custom among cattle owners of this county, during the time you have been engaged in the cattle business, to drive to market and sell the cattle of their neighbors where they were on friendly terms with each other, without any special authority for so doing, and with the understanding that they would be paid for by the men who drove them such price as they could obtain for them in the market, with or without a reasonable compensation for driving them?" This question was objected to by the State Attorney and excluded by the court, and we are of the opinion that there was no error in the ruling. The question was on cross-examination of the state's first witness, and was not in cross of any testimony brought out on direct examination by the state, but the objection was not based on this ground, and it may be said to have been waived. The charge against the defendant was for the larceny of the animals described in the indictment, and this included not only a wrongful taking of the property of another, but also that it was done *animo furandi*, or with the intent to steal. There can, of course, be no legal custom to justify one man in stealing the property of another, as such a custom would be bad and contrary to law. Commonwealth *v.* Doane, 1 Cushing, 5. We do not understand that this legal proposition is questioned by counsel for plaintiff in error, but it is insisted that the custom proposed to be shown, if it existed, was proper as bearing upon the intent with which the accused took the property, and that it would tend to show he did not take it with a felonious purpose. It had not been shown that the accused was a cattle owner residing in DeSoto county on friendly terms with the owner of the cattle alleged to have been stolen, or was in any way entitled to avail himself of the custom sought to be shown. Subsequent testimony of the accused himself showed that he was not a cattle owner, and was not in a situation to avail himself of such a custom, if it did exist. If it had been shown, or offered to be shown, that the accused was a cattle owner, residing in DeSoto county, on friendly terms with the owner of the cattle in question, and that, under such a custom offered to be shown, he had driven the cattle to market and had sold them, but with the intention of accounting to the owner for the purchase money, we do not intimate that the evidence of such a custom would be improper. It might become pertinent and material in such a case, but the accused in the present case was not shown to be a stock owner, or in any proper way connected with such a custom, if it existed, and there was no error in rejecting the proposed testimony.

We have entertained some misgivings as to the sufficiency of the evidence to sustain the verdict, but after a careful examination have concluded that it is of such a nature, when viewed in an unfavorable light against the accused, as to sustain the conviction. The credibility of witnesses, in case of conflict, we leave to the settlement of the jury; nor can we say how much credence must be given to the evidence of the accused where there is conflict or improbability of statement. It is true, as contended by counsel for plaintiff in error, that to constitute larceny, the taking must be with a felonious intent at the time, and whether such intent existed is a question of fact to be determined by the jury from all the facts of the case. The testimony before us shows beyond dispute that the accused gathered the cattle of Adam Mercer and drove them some thirty miles to a market and sold them for money which he never accounted to the owner for, or offered to make any account, and under all the facts of the case we are of the opinion that the question of whether the accused took the cattle with felonious purpose of converting them to his own use and profit, was proper for the jury to settle, and as they determined it adversely to him, the judgment will be affirmed.

CHAPTER VI.

PARTIES IN CRIME.

SECTION I.

Who are Parties.

ANONYMOUS.

Old Bailey. 1723.

[*Reported* 8 *Mod.* 165.]

At the sessions in the Old Bailey held there on the ninth day of April, in the ninth year of George the First, where some of the judges of the Common Pleas were present, this case happened:

Two men were beating another man in the street in the night-time. A stranger passing by at the same time said, "I am ashamed to see two men beat one." Thereupon one of those who was beating the other ran to the stranger in a furious manner, and with a knife which he held in his right hand, gave him a deep wound, of which he died soon after. And now both the others were indicted as principals for the said murder.

But the Judges were of opinion that, because it did not appear that one of them intended any injury to the person killed, he could not be guilty of his death, either as principal or accessory. It is true, they were both doing an unlawful act, but the death of the party did not ensue upon that act.

REX *v.* RICHARDSON.

Old Bailey. 1785.

[*Reported Leach* (4*th ed.*) 387.]

At the Old Bailey, in June Session 1785, Daniel Richardson and Samuel Greenow were indicted before Mr. Justice Buller for a highway robbery on John Billings.

It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him in a peremptory manner what money he had in his pocket; that upon his replying that he had only two-pence half-penny one of the prisoners immediately said to the other, "If he really has no more do not take that," and turned as if with an intention to go away; but the other prisoner stopped the prosecutor, and robbed him of the two-pence half-penny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them had taken the half-pence from his pocket.

The Court. The point of law goes to the acquittal of both the prisoners; for if two men assault another with intent to rob him, and one of them, before any demand of money, or offer to take it be made. repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion who afterwards takes the money; for he changed his evil intention before the act which completes the offence was committed. That prisoner therefore, whichever of the two it was who thus desisted, cannot be guilty of the present charge; and the prosecutor cannot ascertain who it was that took the property. One of them is certainly guilty, but which of them personally does not appear. It is like the Ipswich Case, where five men were indicted for murder; and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the court thereupon said that, as the man could not be clearly and positively ascertained, all of them must be discharged.

The two prisoners were accordingly acquitted.[1]

REGINA v. SWINDALL.

Stafford Assizes. 1846.

[*Reported* 2 *Carrington & Kirwan*, 230.]

Manslaughter. — The prisoners were indicted for the manslaughter of one James Durose. The second count of the indictment charged the prisoners with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, and thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting.

Upon the evidence it appeared that the prisoners were each driving a cart and horse, on the evening of the 12th of August, 1845. The first time they were seen that evening was at Draycott toll-gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean Bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. The next place where they were seen was forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, "We have driven over an old man," and desired him to bring a light and look at the name on the cart; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises, and, although he could not say that both carts had passed over his body, it was possible that both might have done so.

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[1] *Acc.* People v. Moody, 45 Cal. 289. — Ed.

Greaves, in opening the case to the jury, had submitted that it was perfectly immaterial in point of law, whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road; that that was an unlawful act, and, as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. It was clear that they were either partners, master and servant, or at all events companions. If they had been in the same cart, one holding the reins, the other the whip, it could not be doubted that they would be both liable for the consequences; and in effect the case was the same, for each was driving his own horse at a furious pace, and encouraging the other to do the like.

At the close of the evidence for the prosecution, *Allen*, Serjt., for the prisoners, submitted that the evidence only proved that one of the prisoners had run over the deceased, and that the other was entitled to be acquitted.

Pollock, C. B. I think that that is not so. I think that Mr. Greaves is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last he is equally liable: the person who runs over the man would be a principal in the first degree, and the other a principal in the second degree.

Allen, Serjt. The prosecutor, at all events, is bound to elect upon which count he will proceed.

Pollock, C. B. That is not so. I very well recollect that in Regina *v.* Goode there were many modes of death specified, and that it was also alleged that the deceased was killed by certain means to the jurors unknown. When there is no evidence applicable to a particular count, that count must be abandoned; but if there is evidence to support a count, it must be submitted to the jury. In this case the evidence goes to support all the counts.

Allen, Serjt, addressed the jury for the prisoners.

Pollock, C. B., in summing up. The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct, and, if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one ship-owner may recover against another for any damage done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But in the case of loss of life the law takes a totally different view, — the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally, it may be laid down that where one by his negligence has contributed to the death of another he is responsible; therefore, you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners. A distinction has been taken between the prisoners: it is said that the one who went first is responsible, but that the second is not. If it is necessary that both should have run over the deceased, the case is not without evidence that both did so. But it appears to me that the law, as stated by Mr. Greaves, is perfectly correct. Where two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after the other, and the driver of the first is guilty of negligence, the driver of the second, who had not the same means of pulling up, may not be responsible. But when two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt.[1]

Verdict, Guilty.

Greaves and *Kynnersley*, for the prosecution.

Allen, Serjt., and *G. H. Whalley*, for the prisoners.

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[1] See Reg. *v.* Salmon, 14 Cox C. C. 494. — Ed.

REGINA *v.* CONEY.

COURT FOR CROWN CASES RESERVED. 1882.

[*Reported* 8 *Q. B. D.* 534.]

CAVE, J.[1] In this case I am of opinion that the direction to the jury was wrong, and consequently that the conviction ought not to stand.

No direction to a jury can, in my opinion, be regarded as right or wrong without reference to the evidence before the jury; for a direction which is sufficient under a certain state of facts may be misleading and wrong under another state of facts. It is important, therefore, first to see what the offence was with which the prisoners were charged and what was the evidence against them.

The prisoners were charged in one count with a common assault on one Burke, and in another count with a like assault on one Mitchell.

The evidence was that on the 16th of June last, at the close of Ascot races, Burke and Mitchell had engaged in a fight near the road from Ascot to Maidenhead; that a ring was formed with posts and ropes; that a large number of persons were present looking on, some of whom were undoubtedly encouraging the fight; that the men fought for some time; and that the three prisoners were seen in the crowd, but were not seen to do anything, and there was no evidence how they got there or how long they stayed there.

The chairman of quarter sessions directed the jury in the words of Russell on Crimes, vol. i. p. 818: "There is no doubt that prize-fights are illegal, indeed just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow, and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are, in point of law, guilty of an assault." And the chairman added, in the words of LITTLEDALE, J., in Rex *v.* Murphy, 6 C & P. 103: "If they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."

By this direction I gather that the chairman laid down as matter of law, first, that the actual fighters in a prize-fight are guilty of an assault; and, secondly, that if any person is shewn to have been present in the crowd looking on at the fight, that is not merely evidence, but, if unexplained, conclusive proof that he was aiding and abetting the assault. That seems to be the natural meaning of the language used, and that, from the finding of the jury, appears to me to be the sense in which they understood it. They found a verdict of guilty against five of the prisoners who, I presume, were proved to have taken some active part, or to have been there for the purpose of encouraging the fight; and as to the three prisoners in question, they found that they were guilty of an assault, and yet that they were not aiding and abetting, which is to my mind an inconsistent finding. Indeed, on no other supposition can I understand the verdict, for the evidence against the three prisoners, and especially against Gilliam, is quite consistent with their being laborers working near or persons going quietly home from the races, who, observing a crowd, went up to see what the matter was, and finding it was a fight, stayed some short time looking on.

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[1] Concurring opinions were delivered by STEPHEN, LOPES, NORTH, and HAWKINS, JJ., HUDDLESTON, B., MANISTY and DENMAN, JJ., and dissenting opinions by MATHEW, J., POLLOCK, B., and LORD COLERIDGE, C. J.

For the defence it was first contended that inasmuch as Burke and Mitchell had agreed to fight there was no assault. I am, however, of opinion that this is not so. With regard to an action for an assault, in the case of Boulter *v.* Clarke, Buller's Nisi Prius, p. 16, it was held by PARKER, C. B., that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful, and in Matthew *v.* Ollerton, Comb. 218, it was held that if one license another to beat him, such license is no defence, because it is against the peace. So with regard to an indictment for an assault, PATTESON, J., in Rex *v.* Perkins, 4 C. & P. 537, speaking of a prize-fight, says, if all these persons went out to see these men strike each other, and were present when they did so, they are all in point of law guilty of an assault. There is also the authority of COLERIDGE, J., in Reg. *v.* Lewis, 1 C. & K. 419, who says that whenever two persons go out to strike each other, and do so, each is guilty of an assault.

Reg. *v.* Orton, 39 L. T. 293, proves nothing against this view, for the most that can be said of that case is that this point did not arise there. Christopherson *v.* Bare, 11 Q. B. 473, has also nothing to do with this point, all that was there decided being that a plea of leave and license was not a good defence to an action for an assault, on the ground that if that is a defence, it arises under the general issue, an assault by leave and license being a contradiction in terms.

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in Reg. *v.* Orton, 39 L. T. 293.

It was next contended that the chairman was wrong in directing the jury in the words of LITTLEDALE, J., in Rex *v.* Murphy, 6 C. & P. 103, that if the prisoners were not merely casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything.

Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony, or apprehend the felon.

In 1 Hale, Pleas of the Crown, p. 439, it is said that to make an abettor to a murder or a homicide principal to a felony there are regularly two things requisite; 1st, he must be present, 2d, he must be aiding and abetting. If, says Hale, A. and B. be fighting and C., a man of full age, comes by chance, and is a looker-on only, and assists neither, he is not guilty of murder or homicide as principal in the second degree.

So again in Foster's Crown Law, p. 350, it is said that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behavior of his, though highly criminal, will not of itself render him either principal or accessory." "I would be here," he continues, "understood to speak of that kind of homicide, amounting in construction of law to murder, which is usually committed openly and before witnesses, for in the case of assassinations done in private, to which witnesses who are not partakers in the guilt are very rarely admitted, the circumstances I have mentioned may be made use of against A., as evidence of consent and concurrence on his part; and in that light should be left to the jury, if he be put upon his trial."

This seems to me to hit the point. Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury.

In accordance with the principles here laid down, Kelly, C. B., in Reg. *v.* Atkinson, 11 Cox, 330, a case of persons who were indicted for a serious riot, held, that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge, and that in order to find any of the defendants guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped, or encouraged, or incited the others in the prosecution of that purpose.

In Rex *v.* Borthwick, 1 Doug. 207, it is laid down that from mere presence the court cannot intend that the prisoner was aiding and abetting.

In Rex *v.* Perkins, 4 C. & P. 537, Perkins and three others were indicted for a riot, and an assault on Coates.

It appeared that a prize-fight was fought between Perkins and Coates, and that of the other three defendants, one acted as Perkins's second, another collected money for the combatants, while the third walked round the ring and kept the people back. Mr. Justice PATTESON said, "It is proved that all the defendants were assisting in this breach of the peace, and there is no doubt that persons who are present on such an occasion, and taking any part in the matter, are equally guilty as principals."

The foreman of the jury said that they doubted whether they could find all the defendants guilty of an assault, whereupon Mr. Justice PATTESON said, "If all these persons went out to see these men strike each other, and were present when they did, they are all in point of law guilty of an assault. There is no distinction between those who concur in the act and those who fight." Whereupon the jury convicted the men of the riot, but acquitted them of the assault.

In that case there was ample evidence that the accused were guilty of the assault, and the case did not require PATTESON, J., to lay down, nor do I understand him as having laid down, that a mere on-looker is *ipso facto* guilty of an assault. On the contrary, I understand him to say, that to be guilty, they must not only be present, but must be "taking part in the matter," as he expresses it in the one passage, or, "concurring in the act," as he expresses it in the other.

In Reg. *v.* Young, 8 C. & P. 644, the prisoners were indicted for the murder of Mirfin, who was killed in a duel by one Eliot. In summing up, VAUGHAN, J., said, "There is no difficulty as to the law upon this subject. Principals in the first degree are those by whom the death wound is inflicted. Principals in the second degree those who are present at the time it is given, aiding and abetting, comforting and assisting the persons actually engaged in the contest — mere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals. If either of the prisoners sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not do or say anything, yet, if he was present and was assisting and encouraging when the pistol was fired, he will be guilty of the offence imputed by the indictment." In that direction I entirely concur, but I believe if a similar direction had been given in the present case, the prisoners would have been acquitted.

In Reg. *v.* Cuddy, 1 C. & K. 210, the prisoner was charged with aiding and abetting Munro in the murder of Colonel Fawcett, whom Munro had shot in a duel. WILLIAMS, J., in directing the jury in the presence of ROLFE, B., said, "When two persons go out to fight a deliberate duel, and death ensues, all persons who are present on that occasion, encouraging or promoting that death, will be guilty of abetting the principal offender."

So far the decisions are uniform. There are, however, two which may seem to favor a different view of the law.

In Rex *v.* Bellingham, 2 C. & P. 234, Bellingham and Savage had agreed to fight, and about 1000 persons were assembled to witness it. Mr. Rogers, a police magistrate, being applied to to prevent it, went to the place and told them they should not fight. Skinner said they should, and a scuffle ensued between him and Mr. Rogers, which ended in a general tumult on the part of the mob, and the rescue of Skinner. Bellingham, Savage, and Skinner were indicted for a riot, and for assaulting Mr. Rogers, and were convicted. In the course of his summing-up, BURROUGH, J., said, "By law, whatever is done in such an assembly by one, all present are equally liable. These fights are unlawful assemblies, and every one going to them is guilty of an offence." These *obiter dicta* appear to me to be no justification for the ruling of the chairman in the present case. BURROUGH, J., could not have intended to say that all who were present for the purpose of seeing the fight were *ipso facto* liable for the riot and assault upon the magistrate which arose incidentally out of his trying to prevent the fight, and, if he did not mean that, his remarks had no relation to the offence then being tried, and were merely in the nature of a caution. Moreover, taking the whole together, BURROUGH, J., seems to have referred to people going to prize-fights for the purpose of encouraging them, and not to mere on-lookers.

In Rex *v.* Murphy, 6 C. & P. 103, the prisoner was indicted for the murder of one Thompson. It was proved for the prosecution that there was a fight between Michael Murphy and the deceased, who died in consequence of the blows he received, and that the prisoner acted as one of the seconds. For the defence witnesses were called to shew that though the prisoner was present, he did not act as second, and that he did nothing, and did not even say anything. Mr. Justice LITTLEDALE told the jury that if the prisoner was at the fight encouraging it by his presence, he was guilty of manslaughter, although he took no active part in it, and, on his attention being drawn to the evidence for the defence, his Lordship said, "I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter if they encouraged it by their presence — I mean, if they remained present during the fight. I say that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. If the death occurred from the fight, all persons encouraging it by their presence are guilty of manslaughter."

This summing-up unfortunately appears to me capable of being understood in two different ways. It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law so laid down; if the latter, I am unable to do so. It appears to me that the passage tending to convey the latter view is that which was read by the chairman in this case to the jury, and I cannot help thinking that the chairman believed himself, and meant to direct the jury, and at any rate I feel satisfied that the jury understood him to mean, that mere presence unexplained was conclusive proof of encouragement and so of guilt; and it is on this ground I hold that this conviction ought not to stand.

COMMONWEALTH v. HADLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846.

[*Reported* 11 *Metcalf*, 66.]

SHAW, C. J. The present case, which comes before the Court upon exceptions, presents a question of great importance affecting the administration of the license laws of this Commonwealth. The defendant was indicted upon the ss. 1 & 2 of c. 47 of the Revised Statutes, and by a general verdict was convicted on both. Exceptions were taken to the directions of the judge before whom the indictment was tried in the municipal court. It appears by the bill of exceptions that evidence was introduced in support of the indictment tending to show sales of spirituous liquors to be used in a certain shop, which sales were effected therein by the defendant. On this proof the public prosecutor relied to prove the sale by the defendant, as charged in the indictment.

The bill of exceptions then states that "the defendant offered evidence to show that the premises in which the sales were effected were not leased to him; that he was not the proprietor nor owner thereof; that he was merely a hired agent, having no interest in the profits, and acting in the presence and under the control of his employer; and he contended that to support the indictment the government must show that the spirituous liquor was to be used in *his* house or other building, and that if the defendant was a mere bartender or hired agent he was not liable under the statute." The judge declined so to direct the jury, but directed them "that such evidence could not be a sufficient defence under the statute, and that if the jury believed that sales were effected by the defendant in the manner before stated, in the house of another as a hired agent or bartender, he was liable under the statute."

The court are of opinion that these directions were right. The evidence first offered on the part of the prosecutor constituted a *primâ facie* case to support the indictment. The Rev. Sts., c. 47, provide, in s. 1, that no person shall presume to be a common seller of wine, brandy, etc., unless first licensed as an innholder or common victualler. Section 2 provides, that if any person shall sell any spirituous liquor, to be used in or about his house or other buildings, without being duly licensed, he shall forfeit, etc. Any person incurs the penalty of the first section who habitually sells to persons indiscriminately, although he does not profess to be, or appear to exercise the vocation of, an innholder or common victualler. Commonwealth *v.* Pearson, 3 Met. 449. Any person incurs the penalty of the second section by selling any quantity, in a particular instance, to be used in his house. Commonwealth *v.* Thurlow, 24 Pick. 374. When, therefore, it was shown that the defendant was making sales of the prohibited article, in a shop adapted for the purpose, to be used on the premises, he was thereby doing acts implying that he claimed and had possession and control of the article sold, and also that he had such actual and uncontrolled possession, occupation, or use of the shop and place of sale and consumption, as were necessary and sufficient to accomplish the act which the law expressly prohibits. Unless, therefore, something further were shown by way of justification or excuse the defendant must be convicted. The true question, therefore, is, whether the evidence offered by the defendant, if it had been admitted, showing that the premises were not his own, but that he acted as the agent and under the authority of another person, without showing that such person was licensed, would constitute such excuse or justification.

Then we are brought to the question of construction — if, indeed, there be room for construction — of those words of the statute, "any person who shall sell." It appears to us that one who offers an article for sale, either upon the application of the purchaser or otherwise, and who, when the offer is accepted, delivers the article in pursuance of the offer, does "sell" or make a sale, according to the ordinary sense and meaning of that term. It would seem strange and contradictory to maintain that one who sells goods on commission, or as the factor, agent, or salesman of another, does not sell them. The argument assumes that a sale must be construed to be a contract by which the owner of property alienates it and transfers his title to another. But this is a very limited view of the subject. It is not less a sale, and even a valid sale, when made by the authority of the owner. So the naked possession of property, however obtained, is some evidence of title. The holder may make a sale *de facto*, which can only be defeated by one having a higher title, and which may be ratified by the assent of the owner. The statute prohibits all sales by unlicensed persons, as well sales *de facto* as sales by an owner, and therefore the case is within the words of the statute.

But it is equally within the spirit of the statute. In construing an act of the legislature, as in construing every other instrument, we are to look at the entire act, and every provision and clause in it, in order to ascertain the meaning and intent. And although the same latitude of construction is not allowed in criminal prosecutions as in civil suits, still the subject-matter is not to be overlooked. The language of the statute is to be so construed, when it reasonably can be, as to promote rather than defeat the obvious purposes of the legislature. Now, in reading this statute, it is impossible not to perceive that the plain and governing purpose of the statute is to restrain and prevent the disorders, breaches of the peace, riot, pauperism, and crime, which would arise from the too free use and too easy mode of obtaining intoxicating liquor in small quantities, and to accomplish this by prohibiting the indiscriminate sale of it by disorderly, unsuitable, and unlicensed persons. The contemplated mischiefs arising from the actual sales would not be less, although the conduct of the seller should also be unlawful in other respects; as when he has obtained the property by finding, and converted it to his own use, or taken it tortiously by an act of trespass, or actually stolen it. Would a shop opened by an unlicensed person for the indiscriminate sale of spirituous liquors be less a nuisance because it is also a receptacle of stolen goods, or because the liquor actually sold in it has been stolen? I shall not be understood to intimate that stealing or receiving stolen goods, or goods obtained unlawfully, would be punishable under this statute as a substantive offence, but only that the actual sale of intoxicating liquor is not the less within the mischiefs, and the express prohibition of the statute, because the subject of the sale has come unlawfully to the possession of the seller.

The construction contended for by the defendant, by which the actual seller should exempt himself from the penalty of the law, by showing that he sold for the use and benefit, and by the authority, of another person, would let in all the mischiefs intended to be prevented by the statute. A person residing out of the State, and beyond the jurisdiction of its laws, by taking the lease of shops, and employing selling agents and barkeepers, might wholly defeat the salutary objects of the law.

It is then urged, *secondly*, as an excuse for the defendant, that he offered to show that he was a hired agent, having no interest in the profits, and acting in the presence of and under the control of his employer. As to his being an agent, the considerations already stated apply to it. As to his acting in the presence of his employer, we think that circumstance would make no difference if the defendant was the ostensible actor in the sale; because one who sells for another, although in his presence, does yet sell, and the law fixes the penalty upon him who does the act. We are to understand in the present case that the sale was actually made by the defendant, otherwise he would not have been convicted by the jury. If the employer should expressly or tacitly command, direct, or instigate him to do it, both might be liable; for it is a general rule of law, in cases of tort, that when two or more are guilty, as actors or participators, of one and the same offence, each is severally liable to the penalty, and either may be severally prosecuted for it. But the command of the master will afford no justification or excuse to the servant making the sale, because it is an unlawful command, which he is not bound to obey, and for the doing of which he can have no indemnity from the employer. These points are familiar, and are well stated in the authorities cited in the argument. Thus it is stated in 1 Bl. Com. 429, 430, "if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful." So in 2 Dane Ab. 316, "the command of a superior to an inferior to commit a tort excuses the latter in no case but that of a wife. Such inferior, as servant, is bound to perform only the lawful commands of his superior; and the inferior person must know, too, when he does an injury; and if he has to pay for it, he has no remedy against his master, except he deceives him." Perkins *v.* Smith, Sayer, 40, and 1 Wils. 328.

Taken in connection with the established maxim that ignorance of the law excuses no one from the penalties of its violation, it seems to follow as a necessary consequence that a salesman or barkeeper cannot excuse himself by showing that he did the act by the order or in the presence of his employer. Whether if the owner, being on the spot, should direct a wife, apprentice, or servant to draw or pour out the liquor, or to deliver it, or even to receive payment for it, the subordinate would be liable, is a question which we are not called upon to decide, and which must depend much on the circumstances of particular cases. It might give rise to a question of fact whether the act done by the subordinate would amount to an actual sale. At all events, the principal, being actively and ostensibly engaged in the transaction, would be unquestionably amenable to the law; and this consideration would render the question of the liability of the subordinate of less practical importance to the due execution of the law.

But where one acts as an agent under a general authority to sell for account of another, we are of opinion that sales of liquor made by him are equally opposed to the letter and spirit of the law as if he were selling his own property, on his own account, and for his own profit.

It is urged, *thirdly*, as an argument against this view of the law, that if correct, every barkeeper and salesman must himself be licensed, or he would subject himself to the penalties of the law, which could not have been contemplated by the legislature. But we think this is not a sound conclusion from the premises. An innkeeper or retailer has a *lawful authority* under his license to sell spirituous liquors, under certain restrictions, at a place designated. One may do lawful acts by an agent, and the maxim *qui facit per alium facit per se* makes them, in legal contemplation, his own; and his license will authorize him to employ persons under him, and will be their justification. This right must, of course, have its reasonable limits. We do not mean to intimate that one can make a general assignment of his license, because the law contemplates a personal trust, but that he may authorize others to act with and under him in executing the powers granted to him by the license. All, therefore, that an agent or barkeeper has to do, in order to secure an immunity from the penalties of the law, is not to obtain a license himself, but to be well assured that his employer has one.[1]

PEOPLE *v.* PARKS.

SUPREME COURT OF MICHIGAN. 1882.

[*Reported* 49 *Michigan*, 333.]

CAMPBELL, J. Respondent was convicted under the statute of 1881, making it a misdemeanor to sell intoxicating liquor to persons who are in the habit of becoming intoxicated. The sale was not made by respondent, but by a clerk. The court below held that the respondent was responsible for the knowledge of his clerk, as well as if he had known the condition of the vendee himself.

The statute in question prohibits sales by means of clerks as well as in person. Laws 1881, p. 355, s. 12. And a subsequent section (13) makes violations of the statute misdemeanors, and punishable as such. But it would be an unjust and inadmissible interpretation to construe such a provision as covering anything but an act in which the will of the respondent concurred in the sale. It is contrary to every rule of law to hold a person criminally responsible for an act in which he has taken no part. He can only be punished for what is his own wrong. Section 2 clearly implies the necessity of criminal intent as an element of the offence, and lays down certain rules of presumption involving personal knowledge of the act done. It makes the act of sale to an improper person presumptive evidence of such intent to violate the law. The case comes within the decision in Faulks *v.* People, 39 Mich. 200. It cannot be permissible to give any other construction, which would violate the elementary rules of criminal responsibility.

Whatever civil liability may arise from the acts of a clerk, the criminal responsibility must fall on the actual wrong-doers, who have done or been connected with the violation of the law by some fault of their own.

The conviction should be set aside and the case dismissed.

The other justices concurred.[2]

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[1] Part of the opinion, relating to another objection, is omitted.

See *acc.* State *v.* Bell, 5 Porter, 365; Com. *v.* Drew, 3 Cush. 279; State *v.* Bugbee, 22 Vt. 32. — ED.

[2] But see People *v.* Roby, 52 Mich. 577. — ED.

REGINA *v.* TYRRELL.

COURT FOR CROWN CASES RESERVED. 1893.

[*Reported* 1894, 1 *Q. B.* 710.]

CASE reserved by Mr. Commissioner Kerr.

The defendant, Jane Tyrrell, was on September 15, 1893, tried and convicted at the Central Criminal Court on an indictment charging her, in the first count, with having unlawfully aided and abetted, counselled, and procured the commission by one Thomas Ford of the misdemeanor of having unlawful carnal knowledge of her whilst she was between the ages of thirteen and sixteen, against the form of the statute, etc.; and, in the second count, with having falsely, wickedly, and unlawfully solicited and incited Thomas Ford to commit the same offence.

It was proved at the trial that the defendant did aid, abet, solicit, and incite Thomas Ford to commit the misdemeanor made punishable by s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

The question for the opinion of the Court was, "Whether it is an offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in the commission of the misdemeanor of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanor."

LORD COLERIDGE, C. J. The Criminal Law Amendment Act, 1885, was passed for the purpose of protecting women and girls against themselves. At the time it was passed there was a discussion as to what point should be fixed as the age of consent. That discussion ended in a compromise, and the age of consent was fixed at sixteen. With the object of protecting women and girls against themselves the Act of Parliament has made illicit connection with a girl under that age unlawful; if a man wishes to have such illicit connection he must wait until the girl is sixteen, otherwise he breaks the law; but it is impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves. I am of opinion that this conviction ought to be quashed.

MATHEW, J. I am of the same opinion. I do not see how it would be possible to obtain convictions under the statute if the contention for the Crown were adopted, because nearly every section which deals with offences in respect of women and girls would create an offence in the woman or girl. Such a result cannot have been intended by the legislature. There is no trace in the statute of any intention to treat the woman or girl as criminal.

GRANTHAM, LAWRANCE, and COLLINS, JJ., concurred.

Conviction quashed.

COMMONWEALTH *v.* WILLARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[*Reported* 22 *Pick.* 476.]

THIS was a writ of *habeas corpus* to the sheriff of this county, to bring before the Court the body of George W. Richardson.

It appeared, that Richardson was summoned as a witness before the grand jury for the purpose of proving that one Gould had sold to him spirituous liquors, in violation of St. 1838, c. 157, § 1; that he refused to testify on the ground that, as such sale was made a misdemeanor by the statute, his testimony might criminate himself and subject him, as the purchaser, to prosecution at common law for inducing Gould to commit a misdemeanor; and that he was thereupon committed to prison by order of the Court of Common Pleas for contempt.

SHAW, C. J.[1] . . . The witness objected to testifying on the ground that as the selling of spirituous liquors, without being a physician or apothecary licensed for that purpose, was made a misdemeanor by the statute, to purchase of such person necessarily implied an inducement held out to commit such misdemeanor, and that to induce another to commit a misdemeanor is an offence punishable at common law, to which the witness would be exposed. But the Court are of opinion that the witness would not be liable to any prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the Court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject.

It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala*

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[1] Part of the opinion is omitted. — ED.

prohibita, or acts otherwise indifferent than as they are restrained by positive law. All the cases cited in support of the objection of the witness are of this description.

Rex *v.* Higgins, 2 East, 5, was a case where the accused had solicited a servant to steal his master's goods, and it was held to be a misdemeanor. The crime, if committed pursuant to such solicitation, would have been a felony.

Rex *v.* Phillips, 6 East, 464, was a manifest attempt to provoke another person by a letter to send a challenge to fight a duel. For although the direct purpose of the letter of the defendant was to induce the other party to send a challenge, which is technically a misdemeanor, yet the real object was to bring about a deed, which is a high and aggravated breach of the public peace, and where it results in the death of either party, is clearly murder. It was averred to be done with an intent to do the party bodily harm and to break the king's peace, and such intent was considered a material fact to be averred and proved.

A case depending upon a similar principle in our own books is that of Commonwealth *v.* Harrington, 3 Pick. 26, in which it was held that to let a house to another, with an intent that it should be used and occupied for the purpose of prostitution, with the fact that it was so used, was a misdemeanor. The keeping of such a disorderly house has long been considered a high and aggravated offence, criminal in itself, tending to general disorder, breaches of the public peace, and of common nuisance to the community. It is in cases of this character only, that the principle has been applied; but we know of no case, where an act, which, previously to the statute, was lawful or indifferent, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the Court are all of opinion that it does not apply to the case of one who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute.

There is another view of the subject which we think has an important bearing on the question, if it is not indeed decisive. The statute imposes a penalty upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling, or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was intended by the legislature.

Ordered, that the prisoner be remanded to the custody of the sheriff to abide the order of the Court of Common Pleas under which he stands committed.

COMMONWEALTH *v.* KOSTENBAUDER.

SUPREME COURT OF PENNSYLVANIA. 1886.

[*Reported* 20 *Atlantic Reporter*, 995.]

Certiorari to Court of Quarter Sessions, Lehigh County.

Kostenbauder, Houck, and Schweitzer induced Boehmer, a saloon-keeper, to give them liquor on Sunday. Later Boehmer was sued for a violation of the law, in which proceeding Kostenbauder, Houck, and Schweitzer appear as witnesses against him. Boehmer, then alleging that there had been a full understanding between the three to procure from him the liquor and then proceed against him in order that they might get the share coming to the informer in such cases, made an information against Kostenbauder, Houck, and Schweitzer, and had them arrested for conspiracy. Upon return of the prosecution to the Court of Quarter Sessions an indictment was drawn and presented to the grand jury, which returned "a true bill," whereupon the defendants moved to quash the bill of indictment, on the ground that it did not charge an indictable offence. The court held that no indictable offence was charged, and quashed the indictment. The following is a copy of the opinion of the Quarter Sessions: —

"ALBRIGHT, P. J. If the law provided for the punishment of the man who, on Sunday, buys or drinks, at a licensed public house, intoxicating liquor, then these defendants could be held to answer this indictment; but, inasmuch as the man who buys or drinks the liquor is not punishable, therefore the defendants cannot be held liable for conspiracy to procure beer on Sunday from the saloon-keepers named in the indictment. The law imposes the penalty on him who sells liquor on Sunday, or who, being a licensed public-house keeper, permits it to be drank on his premises on that day. The real offence charged in this indictment is the conspiracy by these three defendants to induce the saloon-keeper to sell or give them drinks on Sunday. The further allegations, that drink was obtained; that it was the intention of getting the informer's share of the penalties; and that suits were brought for the penalties, — add no strength to the charge. It was not unlawful to accept the drink, nor to sue for the penalties. Counsel for the Commonwealth and for defendants agree that this is, in point of law, the correct view of the question. It is impossible to hold that persons are guilty in law for conspiring to do an act, where the act imputed is such that if the intention had been consummated no offence would have been committed. It is not alleged that the defendants by furnishing a stock of liquor, or by any other means, instigated or furthered the illegal act of selling or giving away on Sunday, nor that they conspired by force or threats to coerce the saloon-keepers to sell. The latter were free agents. They sold or gave away the beer because they chose to do so. Where there is a confederacy, but nothing more than solicitations to an intelligent free agent to commit a crime, it is not indictable unless it is made so by statute. 2 Whart. Crim. Law (8th ed.), § 2691. Chief Justice GIBSON, in Shannon *v.* Com., 14 Pa. 226, said that if confederacy constituted conspiracy, without regard to the quality of the act to be done, a party might incur the guilt of it by having agreed to be the passive subject of a battery. Accordingly these defendants would not have been indictable if they had combined and agreed together to go to the prosecutor's house and solicit and induce him to beat them. They are not indictable for having conspired to induce him to give to them drinks on Sunday. Counsel for the Commonwealth rely principally upon the case of Hazen *v.* Com., 23 Pa. 355. It is asserted that it was there held that Hazen and three others had been properly convicted upon an indictment charging that they had conspired to solicit, induce, and procure the officers of a bank to violate a statute which made it a penal offence to issue notes of banks of other states, of a denomination less than five dollars. The statute gave the informer the one-half of the money penalty. But the counts upon which Hazen and his co-defendants were convicted charged more than the mere conspiracy to procure the bank officers to issue the forbidden notes. It was also charged, and found, that one of them had deposited in the bank large sums of money, not for lawful business, and drew them by checks for unequal sums, and required the checks to be paid in bank-notes of less than $5, and that the defendants had threatened to bring penal actions unless they were paid $3,250; that it was the purpose of the conspiracy to compel the bank officers unjustly and unlawfully to pay large sums of money for the corrupt gain of the defendants. The Supreme Court said that they were left to infer that such 'large sums of money' were to be obtained by some other means than a fair prosecution of the offending bank officers; that it was charged that the money was to be drawn from the victims by compounding the offences; that it had been found as a fact that the object of the defendants was not the detection and suppression of crime, but the promotion of their own corrupt gain; that the defendants sought to extort 'hush money' for suppressing the evidence of guilt. The court also said that those who induced a violation of the law for the purpose of compounding the offence and making gain by defeating public justice were guilty of a gross wrong. In this case it is not averred that the defendants offered to settle or compound the offences, nor that they obtained any part of the informer's share of the penalties, nor even that the suits against the saloon-keepers were prosecuted to judgment. In that reference it is simply alleged that the defendants, and others acting with them, have caused writs of summons to be issued by the aldermen for the penalty of $50 in each case. The decision of the question presented in Hazen *v.* Com. does not warrant a ruling that this indictment can be sustained, nor has any authority for such a conclusion been found. The motion to quash must be sustained. If counsel for the Commonwealth desire to obtain the decision of the Supreme Court upon this question, it is probable that this court, upon application of the district attorney, will make an order that the defendants be held under bail until such decision has been obtained. They are now under recognizance for their appearance at the next term. How, December 26, 1885, the indictment is quashed; the recognizance of defendants to remain in force unless discharged by order of the court."

J. Marshall Wright, Dist. Atty., *Henninger & De Walt*, and *E. J. Lichtenwalner*, for the Commonwealth.

John C. Merrill and *Charles R. James*, for Kostenbauder and Houck.

W. J. Stein, for Schweitzer.

Per Curiam. The judgment of the court below is affirmed by a divided court.

SECTION II.

Innocent Agents.

MEMORANDUM.

[*Reported Kelyng*, 52.]

My Brother Twisden shewed me a report which he had of a charge given by Justice Jones to the grand jury at the King's Bench Bar in Michaelmas Term, 9 Car. I., in which he said that poisoning another was murder at common law. And the statute of 1 Ed. VI. was but declaratory of the common law, and an affirmation of it. He cited Vaux and Ridley's Case. If one drinks poison by the provocation or persuasion of another, and dieth of it, this is murder in the person that persuaded it. And he took this difference: If A. give poison to J. S. to give to J. D., and J. S., knowing it to be poison, give it to J. D. who taketh it in the absence of J. S. and dieth of it, in this case J. S. who gave it to J. D., is principal, and A., who gave the poison to J. S. and was absent when it was taken, is but accessory before the fact. But if A. buyeth poison for J. S., and J. S. in the absence of A. taketh it, and dieth of it, in this case A., though he be absent, yet he is principal. So it is if A. giveth poison to B. to give unto C., and B., not knowing it to be poison, but believing it to be a good medicine, giveth it to C. who dieth of it; in this case, A., who is absent, is principal, or else a man should be murdered and there should be no principal. For B., who knew nothing of the poison is in no fault, though he gave it to C. So if A. puts a sword into the hand of a madman, and bids him kill B. with it, and then A. goeth away, and the madman kills B. with the sword as A. commanded him, this is murder in A. though absent, and he is principal; for it is no crime in the madman who did the fact, by reason of his madness. And he said this case was lately before himself and Baron Trevor at the Assizes at Hereford. A woman after she had two daughters by her husband, eloped from him and lived with another man. And afterwards one of her daughters came to her, and she asked her how doth your father, to which her daughter answered, that he had a cold, to which his wife replied, here is a good powder for him, give it him in his posset; and on this the daughter carried home the powder, and told all this that her mother had said to her, and to her other sister, who in her absence gave the powder to her father in his posset, of which he died. And he said that, upon conference with all the judges, it was resolved that the wife was principal in the murder, and also the man with whom she ran away, he being proved to be advising in the poison; but the two daughters were in no fault, they both being ignorant of the poison. And accordingly, the man was hanged, and the mother burnt.

REGINA *v.* BANNEN.

Crown Case Reserved. 1844.

[*Reported* 2 *Moody*, 309.]

The prisoner was tried before Mr. Baron Gurney, at the Spring Assizes for the county of Warwick, 1844, on an indictment for feloniously making a die, which would impress the figure, stamp, and apparent resemblance of the obverse side of a shilling.

Second count, for feloniously beginning to make such a die.

Third count, for feloniously making a die which was intended to impress the figure, stamp, and apparent resemblance of the obverse side of a shilling.

It was proved by Charles Frederick Carter, a die-sinker at Birmingham, that the prisoner applied to him to sink two dies for counters for two whist clubs, one at Exeter and the other at Blandford, stating that it was their practice to play with counters with one side resembling coins, and that they wished to have counters stamped by dies, to be made in pursuance of the following directions: —

Four dies for whist counters; obverse, head of Queen Victoria, as in the shilling coin; reverse, Blandford whist club, established 1800. Obverse, one shilling, as in coin, with wreath, etc.; reverse, Exeter whist club, established in 1800. The obverse to be as much a *fac-simile* as can be; the letters on the reverse to vary in size; all the dies to be the same size, and fit either collar.

When Mr. Carter considered these directions, it occurred to him that there was something very suspicious in them, and he applied to the agent of the mint at Birmingham, and communicated the order to him. The agent sent to the officers of the mint in London for instructions, and Mr. Carter was by them directed to execute the prisoner's order. He proceeded; a long correspondence took place on account of the work not being executed within the time expected. In the course of the correspondence, the prisoner desired to have the obverse of one of the pieces and the obverse of the other finished first, and they were so. When they were finished, they formed a die for the coining of a shilling, and an impression made by the dies was produced in court.

Mr. Serjt. Adams, for the prisoner, objected that the prisoner could not be convicted, as he had not himself done anything in the construction of the die, and that he was not answerable in this form of charge for the act of Carter; that Carter having acted under the instructions of the mint, no felony whatever had been committed; and that the prisoner should have been indicted for a misdemeanor, in inciting Carter to commit a felony.

The learned judge reserved the point for the opinion of the judges. The jury found the prisoner guilty.

This case was argued in Easter term, 1844, before all the judges except COLERIDGE, J., and MAULE, J.

Whitehurst, for the prisoner. The prisoner did not commit the offence as charged in the indictment. The statute 2 W. IV., c. 34, s. 10, enacts that "if any person shall knowingly and without lawful authority (the proof of which authority shall lie on the party accused) make, &c., or begin to make, any puncheon, &c., die, &c., such person shall be guilty of felony." Here no person has without lawful authority made or begun to make a die. The only person who has in fact made or begun to make a die is Carter. Before Carter begins, he applies to the mint. He must be taken to have known the law, and applies to get their authority to proceed. The officers of the mint gave him orders to proceed; he therefore had lawful authority. If they had power to give the authority, then there was no offence. If they had not, then Carter is guilty of the felony as a principal, and the prisoner ought to have been indicted as an accessory before the fact. If Carter was innocent, the prisoner could not be an accessory, nor could he be a principal; he is not present; and if another does the act for him in his absence, that person must be altogether innocent; to be innocent he must be ignorant of any wrong in what he is doing. Suppose a person knowingly employs an ignorant agent to deliver a forged note; the delivery is his, because the agent is ignorant; so if a person employs an ignorant agent to administer poison, that person may be said himself to administer. Carter here cannot be said to be ignorant. He knows the use to which the dies are applicable and the guilty purpose for which they were intended by the prisoner. The dies are also made with the knowledge of the mint. For these reasons Carter cannot be said to be a mere ignorant agent of the prisoner, and therefore the prisoner cannot be a principal felon.

Waddington, for the Crown. There is no doubt that, if Carter was guilty of felony, this indictment fails. But it is impossible to contend that on these facts Carter was a felon. Perhaps, strictly speaking, no one could have lawful authority to make coining instruments; certainly not, if Carter had not.

[TINDAL, C. J. The "having lawful authority" applies to the officers and servants of the mint.]

It is agreed that in one sense he did the act knowingly; but mere knowledge is not enough. The statute means *guilty* knowledge; and that is the distinction clearly pointed out in Foster's "Discourse on Accomplices," p. 349, etc. To be a felon there must be a guilty knowledge. The cases of the child or madman are well established. Now Carter certainly knew what he was doing, but had no intention of any felony or furthering a felony; and the authority and knowledge of the mint would be clearly sufficient to make his knowledge innocent.

In Rex *v.* Palmer and Hudson, Russ. & Ry. 72, which is reported with the judgment delivered by Rooke, J., 1 B. & P. New Rep. 97, this distinction is carried out, and the case put of an uttering a forged note by means of an agent ignorant of the forgery is stated to be law. This has since been held to be law in Rex *v.* Giles, 1 Moody C. C. R. 166. The agent must be an innocent agent. The cases all turn on the distinction of innocent knowledge or guilty knowledge. Carter was clearly an innocent agent, and the prisoner was therefore the principal.

Whitehurst, in reply. Here Carter, the agent, in fact does nothing at all until he has the orders of the mint. He is, throughout, the agent of the mint, not of the prisoner.

All the judges present, except CRESSWELL, J., thought Carter an innocent agent, and held the conviction good.[1]

SECTION III.

Joint Principals.

REX *v.* BINGLEY.

CROWN CASE RESERVED. 1821.

[*Reported Russell & Ryan*, 446.]

THE three prisoners were tried and convicted before MR. JUSTICE RICHARDSON, at the Lent assizes for the county of Warwick, in the year 1821, on an indictment the first count of which charged the prisoners with forging and counterfeiting a £5 bank note, with intent to defraud the Governor and Company of the Bank of England. The third count charged them with falsely making, forging, and counterfeiting, and causing and procuring to be falsely made, forged, and counterfeited, and willingly acting and assisting in the false making, forging, and counterfeiting, a promissory note, for the payment of money, with the like intent. There were other counts for disposing of, and putting away *scienter*, &c.

It appeared in evidence that Bingley and Dutton, and one George Peacock, an accomplice, agreed to take, and did take a house in Birmingham, for the purpose of carrying on therein the manufacture of forged bank notes. The first operation was the purchasing of proper paper, and the cutting of it into pieces of proper size; after which it was taken to the prisoner Batkin, a copper-plate printer, whose workshop was in a different part of Birmingham, to be by him printed, and he accordingly struck off in blank all the printed part of the notes, except the date line and the number. He also impressed on the paper the wavy horizontal lines.

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[1] See *acc.* Reg. *v.* Clifford, 2 C. & K. 202; Reg. *v.* Bleasdale, 2 C. & K. 765; Gregory *v.* State, 26 Ohio St. 510; State *v.* Learnard, 41 Vt. 585. And see Williamson *v.* State. 16 Ala. 431; Com. *v.* Hill, 145 Mass. 305. — ED.

The blanks were then brought back to the house of Bingley, Dutton, & Peacock, and there the water mark was introduced into the paper; after which Bingley, in the presence of Dutton and Peacock, impressed the date line and the number, and Dutton added the signature.

Sometimes the date line and number were inserted before the signature was inserted, and sometimes the signature before the date line and number; but in a certain class of notes (of which the note in the indictment was one) the accomplice said that the signature was added last.

The notes were then complete, although they underwent another operation, that of pressing them between plain sheets of tin, in order to make the surface smooth, before they were put into circulation.

Peacock, the accomplice, did not know that Batkin was employed to print the blank notes, nor did it appear that Batkin ever was present when Bingley and Dutton filled up and completed the notes.

The accomplice stated that Bingley and Dutton were both present when Bingley impressed the date line and number on that class of notes of which the note stated in the indictment was one, but he said he was not certain whether Bingley was present when Dutton afterwards added the signature to the class of notes.

The prosecutors elected to proceed on the counts for forging.

Upon this evidence the learned judge left it to the jury whether the three prisoners did concur and co-operate in the joint design of forging the five-pound note mentioned in the indictment (among other notes) with intent to put it into circulation, and whether they all did perform their respective part in the execution of that design within the county of Warwick. If so, the learned judge advised them to find them all guilty of the forgery.

The learned judge further directed them to find whether the two prisoners, Bingley and Dutton, were present when the note mentioned in the indictment was completed by adding the date line and the signature.

The jury found that all three concurred and co-operated in the design and execution of the forgery, each taking his own part, within the county. They also found that Bingley and Dutton acted together in completing the notes, and therefore found all three guilty on the counts for forging.

The learned judge passed sentence on the prisoners; but respited their execution, in order to submit to the judges the following questions: —

First, Do the acts of parliament which relate to the forging, &c., and causing to be forged, &c., and acting and assisting in the forging, &c., of *promissory notes* apply to *Bank of England notes*, which, although they are undoubtedly promissory notes, are the subject of distinct legislative provisions?

Secondly, Upon the evidence and the finding of the jury, was this a joint offence of forging in the three prisoners, or at least in the two prisoners, Bingley and Dutton?[1]

In Easter term, 1821, the judges met and considered this case. They held that the conviction was right as to all the prisoners: the judges were of opinion that, as each of the prisoners acted in completing some part of the forgery, and in pursuance of the common plan, each was a principal in the forgery; and that although the prisoner Batkin was not present when the note was completed by the signature, he was equally guilty with the others.

COMMONWEALTH *v.* LOWREY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[*Reported* 158 *Mass.* 18.]

HOLMES, J.[1] The main question for us is whether there was any evidence of a criminal breaking and entering. The jury were warranted in finding that, in pursuance of a preconcerted scheme, the defendant Johnson, making a pretence of a wish to purchase an article, got the night clerk of the Theodore Metcalf Company to let him into the company's shop at about midnight; that while the night clerk was in the cellar getting the article, Johnson unbolted the door which had been rebolted behind him after his admission, and let in the defendant Lowrey, who concealed himself and remained behind when Johnson left, and afterwards broke open the draw, etc. The court seems to have required the jury to find that Lowrey opened the door as a condition to their finding him guilty.

It was not necessary that Lowrey should have touched the door if he procured himself to be let in by an accomplice and entered with felonious intent. He might have been convicted, even if the hand which he made use of was innocent, as in case of a servant or constable. Le Mott's case, J. Kel. 42; Farre & Chadwick's case, J. Kel. 43; Cassy & Cotter's case, J. Kel. 62; Hawkins's case, 2 East P. C. 485; Rolland *v.* Commonwealth, 82 Penn. St. 306, 323; Johnston *v.* Commonwealth, 85 Penn. St. 54, 64; State *v.* Rowe, 98 N. C. 629; State *v.* Johnson, Phil. (N. C.) 186; Nicholls *v.* State, 68 Wis. 416, 421, 422; Clarke *v.* Commonwealth, 25 Grat. 908, 913. The accomplice inside the house is guilty of the same offence. Cornwall's case, 2 Strange, 881; 1 Hale, P. C. 553; 4 Bl. Com. 227; Rex *v.* Jordan, 7 C. & P. 432; Cooper *v.* State, 69 Ga. 761; Ray *v.* State, 66 Ala. 281, 282; Breese *v.* State, 12 Ohio St. 146.

The argument for the defendants assumes that the door was not even latched, and speaks of the defendants as having been invited into the shop. In fact, the door would seem to have been bolted, and if there can be said to be any invitation to enter a closed and bolted shop at midnight, the invitation does not extend to thieves when let in by their accomplices.

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[1] Part of the opinion is omitted. — ED.

SECTION IV.

Principals in the Second Degree.

ANONYMOUS.

EXCHEQUER CHAMBER.

[*Reported Y. B.* 13 *Hen. VII.* 10, *pl.* 7.]

A WOMAN brought an appeal for the death of her husband against two, and alleged that one of the appellees held her husband and commanded the other to kill him, by reason of which the other struck him to the heart so that he died at once.

And it was held by all the justices in the Exchequer Chamber that both are principals, because both are parties to the blow. *Quod nota.*

REX *v.* SKERRIT.

BERKSHIRE ASSIZES. 1826.

[*Reported* 2 *C. & P.* 427.]

THE prisoners were jointly indicted for uttering a counterfeit shilling having another counterfeit shilling in their possession.

It was proved that the prisoner, Eliza Skerrit, went into the shop of James George, and there purchased a loaf, for which she tendered a counterfeit shilling in payment; he secured her, but no more counterfeit money was found on her. The other prisoner, who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen other bad shillings were found on her, wrapped in gauze paper.[1]

Carrington, for the prisoners, objected, 2dly, that the complete offence was not proved against either of the prisoners; as the one who uttered the piece of money had no other counterfeit coin in her possession, and the other who had the coin, was not guilty of any uttering. It might be said that the one who stayed outside the shop was guilty of a joint uttering with the other who was in it; like the case of two thieves, one inside the shop and the other outside; but the case of the thieves differed from the present in this respect, viz. that the thief outside might be there to co-operate by the removal of the stolen property or the like. Now the prisoner, Priscilla Skerrit, by staying outside the shop, could not by possibility be considered as aiding her sister in the act of paying for a loaf inside the shop. And in the case of Rex *v.* Else, Russ. & Ry. 142, it was held that if one person utter a bad piece of money, having no more, in conjunction with another, who had more bad money but who was absent and did not utter, neither was guilty of this offence: however, in that case the persons were much further asunder than the prisoners had been in the present.

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[1] Only so much of the case as discusses the joint uttering is given. — ED.

Garrow, B. With regard to the second objection, I think that the two prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering; and it will be for the Jury to say whether the possession of the remaining pieces of bad money was not joint. . . .

Verdict, Guilty.

COMMONWEALTH *v.* KNAPP.

Supreme Judicial Court of Massachusetts. 1830.

[*Reported* 9 *Pickering*, 496]

John Francis Knapp was indicted as principal, together with Joseph Jenkins Knapp and George Crowninshield as accessories, in the murder of Joseph White of Salem, which was perpetrated on the 6th of April, 1830. The indictment alleged that Richard Crowninshield also was a principal, and that he had committed suicide. The parties indicted were tried separately.[1]

The evidence in the case tended to prove that Richard Crowninshield alone entered the house of White and there perpetrated the murder, and that the prisoner was in a street about 300 feet distant from the house, aiding and abetting.

Putnam, J., delivered the opinion of the court. By the most ancient common law, as it was generally understood, those persons only were considered as principals in murder who actually killed the man, and those who were present, aiding and abetting, were considered as accessories. So that if he who gave the mortal blow were not convicted, he who was *present* and aiding, being only an accessory, could not be put upon his trial. But the law was otherwise settled in the reign of Henry IV. It was then adjudged that he who was *present*, *aiding* and *abetting* him who actually killed, was to be considered as actually killing, as much as if he himself had given the deadly blow.

[To the jury.] There is no evidence that the prisoner gave the mortal blows with his own hand; but it is contended on the part of the government that he was *present*, aiding and abetting the perpetrator, at the time when the crime was committed. We are therefore to consider what facts are necessary to be proved to constitute him, who is aiding and abetting, to be a principal in the murder; or, in other words, what, in the sense of the law, is meant by being *present, aiding and abetting.*

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[1] Part of the case, not involving the question of principal and accessory, is omitted. — Ed.

It is laid down in Foster's Crown Law, 349, 350, Discourse 3, § 4, that "when the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at *proper* distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law *present* at it; for it was made a common cause with them; each man operated in his station at one and the same instant towards the common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise." In § 5, — "In order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or *ready to afford* assistance if necessary." So, in 1 Hawkins's P. C. c. 32, s. 7 (7th ed.) *being present in judgment of the law is equivalent to being actually present*, for, says Hawkins, "the hope of their immediate assistance encourages and emboldens the murderer to commit the fact, which otherwise perhaps he would not have dared to do, and makes them guilty in the same degree [as principals] as if they had actually stood by, with their swords drawn, ready to second the villany." These principles have been fully recognized by the very learned and distinguished chief justice of the Supreme Court of the United States, in 4 Cranch, 492.

The person charged as principal in the second degree must be present; and he must be aiding and abetting the murder. But if the abettor, at the time of the commission of the crime, were assenting to the murder, and in a situation where he might render some aid to the perpetrator, ready to give it if necessary, according to an appointment or agreement with him for that purpose, he would, in the judgment of the law, be present and aiding in the commission of the crime. It must therefore be proved that the abettor was in a situation, in which he might render his assistance, in some manner, to the commission of the offence. It must be proved that he was in such a situation, by agreement with the perpetrator of the crime, or with his previous knowledge, consenting to the crime, and for the purpose of rendering aid and encouragement in the commission of it. It must also be proved that he was actually aiding and abetting the perpetrator at the time of the murder. But if the abettor were consenting to the murder, and in a situation in which he might render *any* aid, by arrangement with the perpetrator, for the purpose of aiding and assisting him in the murder, then it would follow as a necessary legal inference, that he was actually aiding and abetting at the commission of the crime. For the presence of the abettor under such circumstances must encourage and embolden the perpetrator to do the deed, by giving him hopes of immediate assistance; and this would in law be considered as actually aiding and abetting him, although no further assistance should be given. For it is clear that if a person is present aiding and consenting to a murder or other felony, that alone is sufficient to charge him as a principal in the crime. And we have seen that the presence by construction or judgment of the law is in this respect equivalent to actual presence.

We do not, however, assent to the position which has been taken by the counsel for the government, that if it should be proved that the prisoner conspired with others to procure the murder to be committed, it follows, as a legal presumption, that the prisoner aided in the actual perpetration of the crime unless he can show the contrary to the jury. The fact of the conspiracy being proved against the prisoner is to be weighed as evidence in the case, having a tendency to prove that the prisoner aided, but it is not *in itself* to be taken as a legal presumption of his having aided unless disproved by him. It is a question of evidence for the consideration of the jury.

If, however, the jury should be of opinion that the prisoner was one of the conspirators, and in a situation in which he might have given some aid to the perpetrator at the time of the murder, then it would follow, as a legal presumption, that he was there to carry into effect the concerted crime; and it would be for the prisoner to rebut the presumption, by showing to the jury that he was there for another purpose unconnected with the conspiracy. We are all of opinion that these are the principles of the law applicable to the case upon trial.[1]

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[1] *Acc.* Rex *v.* Owen, 1 Moody, 96; Rex *v.* Dyson, Russ. & Ry. 523; Thomas *v.* State, 43 Ark. 149; Doan *v.* State, 26 Ind. 495; State *v.* Douglass, 34 La. Ann. 523; State *v.* Jones, 83 N. C. 605. See Amos *v.* State, 83 Ala. 1. Conf. People *v.* Woodward, 45 Cal. 293; State *v.* Hildreth, 9 Ired. 440.

"If three thieves come to a man's house, and one forces and enters the house, and the other two stand outside in the meantime, they shall all three be taken and convicted of this, whatever judgment you may think will be passed on the two." — SPIGONEL, J., in Y. B. 30 & 31 Ed. I. p. 108. — ED.

BREESE *v.* STATE.

SUPREME COURT OF OHIO. 1861.

[*Reported* 12 *Ohio State,* 146.]

PECK, J.[1] Did the court err in that portion of its charge to the jury which is stated in the bill of exceptions ? The charge, which is copied into the statement of the case, and which, on account of its length, I do not propose to repeat here, was, substantially, that if the jury should find, beyond a reasonable doubt, from the testimony, that the defendant had agreed with others to commit the burglary, on the night on which it was done, and that, as a part of said agreement, and to facilitate the breaking and entry and lessen the chances of detection, it was agreed that the defendant should on that night procure or decoy the owner, Whetstone, away from the store in which he usually slept, to a party, about a mile distant, and detain him there while the other confederates were to break and enter said store and remove the goods, and that both parties did, in fact, perform their respective parts of said agreement, that then the defendant was constructively present at the breaking and entry by his confederates, and might be convicted as principal therein if all the other material allegations were proved beyond a reasonable doubt.

We are free to say that this charge, if there was evidence tending to prove it, is unexceptionable.

"Any participation in a general felonious plan, provided such participation be concerted, and there be a constructive presence, is enough to make a man principal in the second degree." Wharton's C. L. 113, and the case cited by Wharton to establish the rule shows what is meant by a "constructive presence."

"If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of such goods, and another of them entices him away, that the man who has the goods may carry them off, all are guilty of the felony." Rex *v.* Standley and others, Russ. and Ry. C. C. 305.

The defendant was, by the agreement, not only to procure Whetstone to go to the party "to give his confederates greater security from detection while in the act of breaking into the store," but the jury were required to find, as a part of the supposed case, that the defendant "kept him there while his confederates were engaged in breaking said store, and in concealing the fruits of said crime in pursuance of said previous confederacy."

The charge would therefore seem to fall within the well-known rule stated in Archbold C. L. 10, "that persons are said to be present, who are engaged in the same design with the one who actually commits the offence, although not actually present at the commission of it, yet are at such convenient distance as to be able to come to the assistance of their associates if required, or to watch to prevent surprise or the like."

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[1] Part of the opinion only is given.

Bishop, in section 460, vol. i. of his Treatise upon Criminal Law, says: "If the will of such other one contributed to the act, the test to determine whether the law deems him a principal rather than an accessory is, whether he was so near, or otherwise so situated, as to make his personal help, if required, to any degree available."

The part assigned by the agreement to the defendant — a constant supervision over Whetstone while the burglary was effected — formed an essential part of the plan of the burglary agreed upon, as much so as the rending of the shutter, or the forcing of the door. And the defendant, in the case supposed, was constructively present at the burglary, if Jones who, in the case from Russ. and Ry. *supra*, enticed McLaughlin away, was constructively present at the subsequent asportation of McLaughlin's money by his confederates, Standley and Webster.

So, in Hess *v.* The State, 5 Ohio 12, it is said: "And in general, if several unite in one common design, to do some unlawful act, and each takes the part assigned him, though all are not actually present, yet all are present in the eye of the law;" citing Foster, 450, 353; 1 Hale's P C. 439; 2 Starkie's Ev. 7.[1]

SECTION V.

Accessories.

2 Hawkins P. C. c. 29, s. 16. It seems to be agreed that those who by hire, command, counsel, or conspiracy, and it seems to be generally holden that those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessories before the fact, both to the felony intended and to all other felonies which shall happen in and by the execution of it, if they do not expressly retract and countermand their encouragement before it is actually committed.

2 Hawkins P. C. c. 29, ss. 26, 27, 34, 35. As to what kind of receipt of a felon will make the receiver an accessory after the fact, it seems agreed that generally any assistance whatever given to one

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[1] See State *v.* Poynier, 36 La. Ann. 572, State *v.* Hamilton, 13 Nev. 386. — Ed.

known to be a felon, in order to hinder his being apprehended or tried or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose, — as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where one harbors and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where one harbors in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him.[1]

Also I take it to be settled at this day that whoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony.

It seems agreed that the law hath such a regard to that duty, love, and tenderness which a wife owes to her husband as not to make her an accessory to felony by any receipt whatsoever given to her husband. Yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole. Also, it seems agreed that no other relation beside that of a wife to her husband will exempt the receiver of a felon from being an accessory to the felony. From whence it follows that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another.

It seems to be clearly agreed that a man shall never be construed an accessory to a felony, in respect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes such by matter subsequent, — as where one receives another who has wounded a person dangerously, that happens to die after such receipt.[2]

REGINA *v.* CLAYTON.

SHROPSHIRE ASSIZES. 1843.

[*Reported* 1 *Carrington & Kirwan*, 128.]

MISDEMEANOR. — The prisoners were indicted for a misdemeanor in having attempted to set fire to a certain malt-house, and were jointly charged by the indictment with so attempting.

It appeared by the evidence that the prisoner Mary Mooney had gone to bed an hour and a half before the fire was discovered, and there was every reason to suppose that she was not present at the time when the fire was lighted; and the evidence, which was entirely circumstantial, tended to show that the prisoner Clayton lighted the fire only a few minutes before it was discovered. Declarations of the prisoner

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[1] See Tully *v.* Com., 11 Bush, 154; Wren's Case, 26 Gratt. 952. — ED.

[2] See Harrel *v.* State, 39 Miss. 702. — ED.

Mary Mooney were proved which tended to show that she knew beforehand that the fire was to take place.

J. G. Phillimore, for the prisoners, submitted that there was no case against the prisoner Mary Mooney on this indictment.

Greaves. All who take part in a misdemeanor are principals, and whatever will make a person an accessory before the fact in a felony makes him principal in a misdemeanor.

WILLIAMS, J. (in summing up). In misdemeanors and in treason, all who take part in the crime are principals; and in this case it is not necessary to prove that the prisoner Mary Mooney was present at the time when the prisoner Clayton attempted to set fire to the malt-house; and if you are satisfied that she counselled and encouraged Clayton to set fire to the malt-house, she may be convicted upon this indictment.[1]

Verdict, Not guilty.

REGINA *v.* BROWN.

BRISTOL ASSIZES. 1878.

[*Reported* 14 *Cox C. C.* 144.]

FREDERICK BROWN was indicted for murder, his wife being also indicted as an accessory before the fact. It was proved that the blow, which proved fatal, was struck within a few feet of where the wife was standing.

LORD COLERIDGE, C. J., directed the acquittal of the female prisoner, pointing out that she should have been indicted as a principal if anything. An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his.

COMMONWEALTH *v.* PHILLIPS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1820.

[*Reported* 16 *Massachusetts*, 423.]

INDICTMENT at the last March term in this county, charging one Thomas Daniels as principal, and the defendant as accessory before the fact, in burglary. The death of Daniels was alleged in the indictment, and the question was whether the prisoner Phillips could lawfully be put upon his trial.[2]

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[1] *Acc.* Lasington's Case, Cro. Eliz. 750 (petty larceny); Booth's Case, Moore, 666 (forgery at common law); Rex *v.* Jackson, 1 Lev. 124 (perjury); U. S. *v.* Gooding, 12 Wheat. 460 (fitting out vessel for slave trade); Sanders *v.* State, 18 Ark. 198 (obstructing highway); Stevens *v.* People, 67 Ill. 587 (keeping gaming-house). — ED.

[2] Arguments of counsel are omitted.

Parker, C. J., stated that the justices had carefully examined the books upon the subject, and were unanimously of opinion that by the common law an accessory cannot be put on his trial, but by his own consent, until the conviction of the principal. The reason of this rule is very plain. If there is no principal there can be no accessory, and the law presumes no one guilty until conviction. Statutes have made a difference as to some lesser species of offences, but do not touch the principle in capital cases. Our only doubt arose from the peculiar circumstance in this case, that the person charged as principal is dead, and can never be tried. If he were alive and on trial, it is possible he might establish his innocence, strong as the evidence has appeared in support of his guilt. In such case the prisoner could not be found guilty, for he could not have been accessory to the commission of the crime as charged. The trial might have been stopped at the commencement of it had our minds been then free from all doubt. But as the prisoner has been put on his trial, he has a right to a verdict.

The jury accordingly, under the direction of the court, immediately returned a verdict of acquittal, and the prisoner was discharged of this indictment.[1]

STARIN *v.* PEOPLE.

Court of Appeals of New York. 1871.

[*Reported* 45 *New York*, 333.]

Church, C. J.[2] The plaintiff in error was indicted as accessory before the fact to the crime of burglary in the first degree, committed by four principals named in the indictment. At the Montgomery Oyer and Terminer, held on the 13th day of May, 1867, the prisoner having been arraigned and plead not guilty to the indictment, the district attorney moved the trial of the prisoner, who, by his counsel, objected to proceeding with the trial until after the conviction of all the principals named in the indictment. The district attorney then admitted that but one of the principals had been convicted, that one other was then in jail, and the other two had not been arrested. The objection was then overruled, and the decision excepted to.

Several other objections were raised and decided, but one of which it is necessary to notice, and as to that the record is as follows: The prisoner, by his counsel, then objected to being tried as accessory to any other principal than the one who was convicted; the court overruled the objection, and the prisoner's counsel then and there duly excepted.

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[1] See *acc.* U. S. *v.* Crane, 4 McLean, 317; Simmons *v.* State, 4 Ga. 465; Whitehead *v.* State, 4 Humph. 278: State *v.* Pybass, 4 Humph. 442. See Hatchett *v.* Com., 75 Va. 925; Ogden *v.* State, 12 Wis. 532. — Ed.

[2] Part of the opinion only is given.

The jury were then impannelled, and the trial proceeded. If this exception is available to the prisoner, it is fatal to the conviction and judgment. An accessory may be tried jointly with the principal, but the jury must first agree upon the guilt of the principal, while an acquittal of the principal necessarily acquits the accessory. Wharton's Crim. Law, § 138. If the accessory is not tried with the principal, he cannot be tried until the principal has been tried and convicted. People *v.* Bacon, 1 Park R., 246. Formerly, if a man was indicted as accessory in the same crime to two or more persons, he could not have been arraigned until all the principals were convicted and attainted. Hale's Pleas of the Crown, 623, chap. 47. And in order to try an accessory, when only one of several principals had been convicted, it was necessary to indict and arraign him as accessory to that one only. Id.

But the modern decisions have somewhat modified this rule, and the weight of authority now is that an accessory may be tried and convicted when one only of several principals named in the indictment has been convicted. 1 Russell on Crimes, 38; Bishop's Crim. Law, § 611; Commonwealth *v.* Knapp, 10 Pick. 477.

But it is well settled that in such a case the accessory must be tried and convicted as accessory to the convicted principal only, in the same manner as though the convicted principal only was named in the indictment. The authorities are uniform on this subject, and I have been unable to find any decision against this position. Strops *v.* Com., 7 Serg. & R. 491; 3 Greenl. Ev. § 52; People *v.* Bacon, 1 Park. 246; 1 Bishop's Crim. Law, 468.

This necessarily results from the rule that the guilt of the principal can only be shown by a judicial trial and conviction, and even then it is not conclusive against the accessory. 10 Pick. *supra.* The association of unconvicted principals with a convicted principal in the indictment does not authorize the trial of an accessory to any but the one convicted, any more than it would if those not convicted had not been named. The decision of the court, therefore, overruling the objection of the prisoner to being tried as accessory to any but the convicted principal, was clearly erroneous.

Mass. R. L. ch. 215, Sects. 3, 7. Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice.

An accessory to a felony after the fact may be indicted, convicted, and punished, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice.

Penal Code of New York, §§ 29, 32. A person concerned in the commission of a crime, whether he directly commits the act constituting the offence, or aids and abets in its commission, and whether present or absent; and a person who directly or indirectly counsels, commands, induces, or procures another to commit a crime, is a principal.

An accessory to a felony may be indicted, tried, and convicted, . . . whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction.

SECTION VI.

Acts done in pursuance of a common design.

ASHTON'S CASE.

King's Bench. 1698.

[*Reported* 12 *Modern*, 256.]

Holt, C. J. Two, three, or more are doing an unlawful act, as abusing the passers-by in a street or highway, if one of them kill a passer-by, it is murder in all; and whatever mischief one does, they are all guilty of it; and it is lawful for any person to attack and suppress them, and command the king's peace; and such attempt to suppress is not a sufficient provocation to make killing manslaughter, or *son assault demesne* a good plea in trespass against them.[1]

RULOFF *v.* PEOPLE.

Court of Appeals of New York. 1871.

[*Reported* 45 *New York*, 213.]

Allen, J.[2] The jury have, by their verdict, found that the homicide was committed either by the accused in person or by some one acting in concert with him in the commission of a felony, and in the prosecution and furtherance of a common purpose and design.

It must be assumed, from the finding of the jury, that the prisoner was one of the three persons who burglariously entered the store on the night of the homicide; that Merrick was killed by one of the burglars, in pursuance of the common intent of all; and that the accused either fired the shot which caused the death, or was present, aiding and abetting his confederates in the commission of the act. The presumption from the evidence, assuming that the witnesses and their statements are credible, as the jury seem to have believed, is, that the accused, in person, committed the homicide; and it is not improbable that, had the jury been left to pronounce upon his guilt or innocence upon that theory alone, without the complications resulting from the submission of the questions touching his responsibility for the acts of any other by whom the deed might have been perpetrated, the result would have been the same. There were but three persons, other than the deceased and his fellow-clerk, present. One of these was disabled and lying upon the floor seriously wounded, and the other was in the grasp of Merrick, the deceased, and was also wounded and injured. The third came up the stairs and fired the pistol which caused the death, and he alone of the three was uninjured and unwounded. The accused, when arrested a day or two after the occurrence, bore no mark of injury upon his person, and could not have been one of the two so badly injured in the encounter with the clerks. It follows that he was either not present, and has, therefore, been wrongfully convicted, or his hand discharged the pistol which caused the death of Merrick. But the jury may have taken other views of the evidence under the charge, so that the questions made upon the trial and presented by the writ of error, upon the rules governing the liability of one to answer criminally for the acts of others, cannot be passed by without consideration.

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[1] See Reg. *v.* Jackson, 7 Cox C. C. 357; Reg. *v.* Salmon, 14 Cox C. C. 494, *supra.* — Ed.

[2] Part of the opinion only is given.

If the homicide was committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the combining parties had united, and for the effecting whereof they had assembled, all were liable to answer criminally for the act, and, if the homicide was murder, all were guilty of murder, assuming that it was within the common purpose. All present at the time of committing an offence are principals, although only one acts, if they are confederates, and engaged in a common design, of which the offence is a part. 1 Russ. on Crimes, 27, 29. The several persons concerned in this offence were assembled for the commission of a felony, and were engaged in the actual perpetration of the offence; and the homicide was committed upon one who was opposing them in the act, and in rescuing and aiding the confederates to escape. To this conclusion the jury must have come.

If there was a general resolution against all opposers, and to resist to the utmost all attempts to detain or hold in custody any of the parties, all the persons present when the homicide was committed were equally guilty with him who fired the fatal shot. 1 Russ. on Crimes, 29, 30. This general resolution of the confederates need not be proved by direct evidence. It may be inferred from circumstances; by the number, aims, and behavior of the parties at or before the scene of action. Id.; Fost. 353, 354; 2 Hawk. P. C. ch. 29, s. 8; Tyler's Case, 8 C. & P., 616. There was enough in this case to authorize the submission of the question to the jury. An express resolution against all opposers can very seldom be proved by direct evidence; but here every circumstance tended strongly to prove it.

Some of the confederates, and perhaps all, were armed; they actually did resist all opposition with such weapons as they could successfully use. When one was detained, being overcome by the opposition, the others returned at the call of their comrade, and the only one in condition to do so, deliberately shot Merrick, who was preventing the escape of one of the confederates, and was cautioned by that confederate, when about to shoot, not to shoot him. The jury were authorized to infer that this act was within the general purpose of the confederates. They may have desisted from their larcenous attempts, and yet the full purpose of the combination not have been carried out so long as one of the party was detained and held a prisoner.[1]

STATE *v.* ALLEN.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1879.

[*Reported* 47 *Connecticut*, 121]

BEARDSLEY, J.[2] The court charged the jury as follows: "If the jury shall find that Hamlin and Allen, at some time previous to the homicide, made up their minds in concert to break the State prison and escape therefrom at all hazard, and knowing that the enterprise would be a dangerous one and expose them to be killed by the armed night-watchman of the prison should they be discovered in making the attempt, wilfully, deliberately, and premeditatedly determined to arm themselves with deadly weapons, and kill whatever watchman should oppose them in their attempt; and if the jury should further find that in pursuance of such design they armed themselves with loaded revolvers to carry their original purpose into execution, and while engaged in efforts to escape from the prison were discovered by the watchman Shipman (the deceased), and in the scuffle which ensued he was wilfully killed by Hamlin or Allen while they were acting in concert and in pursuance of their original purpose so to do in just such an emergency as they now found themselves in, — then Hamlin and Allen are both guilty of murder in the first degree. And in the opinion of the court Allen would be guilty of murder in the first degree if, in the state of things just described, he in fact abandoned, just before the fatal shot was fired by Hamlin, all further attempt to escape from the prison, and the infliction of further violence upon the person of Shipman, without informing Hamlin by word or deed that he had so done, and Hamlin, ignorant of the fact, shortly after fired the fatal shot, in pursuance of and in accordance with the purpose of the parties down to the time of the abandonment."

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[1] *Acc.* State *v.* Barrett, 40 Minn. 77; State *v.* Davis, 87 N. C. 514; State *v.* Johnson, 7 Or. 210. — ED.

[2] Part of the opinion only is given.

We do not think that the objection made by the defence to this part of the charge is well founded. Under such circumstances Allen's so-called abandonment would be but an operation of the mind, — a secret change of purpose. Doing nothing by word or deed to inform his co-conspirator of such change of purpose, the reasonable inference would be that he did not intend to inform him of it, and thus he would be intentionally encouraging and stimulating him to the commission of the homicide by his supposed co-operation with him. Such intent not to inform Hamlin of his change of purpose would, under the circumstances, be decisive of his guilt.

But the charge proceeds: "In other words, if during the fatal encounter with deadly weapons, in the state of things just described, Allen suddenly abandoned Hamlin, abandoned the enterprise and went to his cell, without saying a word to Hamlin to the effect that he had abandoned the enterprise, and Hamlin, supposing that he was still acting with him and that he had gone to his cell for an instrument to carry on the encounter, fired the fatal shot, his abandonment under such circumstances would be of no importance. A man cannot abandon another under such circumstances and escape the consequences of the aid he has rendered up to the time of the abandonment."

A majority of the court think that the jury may have been misled by this part of the charge, and that therefore, especially in view of the grave issues involved in the case, a new trial should be granted.

If Allen did in fact before the homicide withdraw from the conspiracy, abandon the attempt to escape, and with the knowledge of Hamlin leave and go to his cell, Hamlin's misconstruction of his purpose in leaving did not necessarily make his conduct of no importance.

Until the fatal shot there was the *locus penitentiæ.* To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if with the intention of notifying Hamlin of his withdrawal from the conspiracy he did acts which should have been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended, and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed.

Allen's act of leaving and going to his cell, if he did so, had some significance in connection with the question of intention and notice, and was therefore proper for the consideration of the jury. How much weight was to be given to it would depend upon circumstances, such as the situation of the parties and the opportunity for verbal or other notice.

A new trial is advised.

STATE *v.* LUCAS.

SUPREME COURT OF IOWA. 1880

[*Reported* 55 *Iowa*, 321.]

DAY, J. — R. G. Edwards, on behalf of the State, testified in substance that he was night watchman for Hemmingway & Barclay's mill, at Lansing; that on the night of August 24, 1879, the defendant and Wood assaulted and knocked him down, tied his hands and feet and carried him into the mill, and that while the defendant went after a sledge to open the safe in the mill, Wood took three dollars in silver from his pocket. The evidence shows that the safe was blown open on the same night. The defendant, on his own behalf, testified that he had nothing to do with robbing Edwards, and was not at the mill at all, that he rowed Wood and Harris in a skiff, from La Crosse to Lansing, and landed near the mill about nine o'clock on the night of the robbery; that Wood and Harris went up town and left him to watch the boat; that afterward they came down to the boat in a hurry and directed him to row over to Wisconsin; that on the way he saw them dividing some silver money; that when they reached the Wisconsin shore they sunk the boat; that on the way to La Crosse Wood told him all that happened, and gave him two revolvers to carry.

The court instructed the jury as follows: "If you believe from all the evidence that the defendant did not leave the boat after the arrival at Lansing; yet if you also believe that he had knowledge of the intent of his associates to commit crime, either of robbery of the man Edwards, or of robbing the safe in Barclay and Hemmingway's mill, or any other crime, and rowed them ashore for such purpose, and waited in the boat for them during their absence in committing the crime, then you will find the defendant guilty."

The doctrine of this instruction is that if the defendant knew of the intent of his associates to rob the safe in Barclay & Hemmingway's mill, and rowed them ashore for that purpose and awaited their return he is guilty of the robbery of Edwards. This doctrine is not correct. It is true the accessory is liable for all that ensues upon the execution of the unlawful act contemplated; as, if A commanded B to beat C, and he beats him so that he dies, A is accessory to the murder. So if A commanded B to burn the house of C, and in doing so the house of D is also burnt, A is accessory to the burning of D's house. So, in this case, if Lucas had knowledge of the intention to rob the safe, and aided and abetted his associates in the commission of that offence, and if, in furthering that purpose. a fatal assault had been made upon Edwards, the defendant would have been accessory to the murder.

But. if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A, and instead of so doing he intentionally commit the same crime against B, the accessory will not be answerable. See 1 Wharton's Criminal Law, section 134, and authorities cited. It follows that the defendant cannot be convicted of a robbery of Edwards, from the mere fact that he abetted his associates in the robbery of Barclay & Hemmingway's safe. If the intention of Lucas was to abet, and share in the proceeds of, any robbery that his associates might commit, a different rule would apply. But this is not the thought of the instruction under consideration. Our view of the law governing this case is sufficiently indicated by the foregoing, without noticing consecutively the other errors assigned and argued.

Reversed.[1]

REX v. HAWKINS.

WORCESTER ASSIZES. 1828.

[*Reported* 3 *C. & P.* 392.]

THE indictment charged the prisoners, and a person named Williams (who was not in custody), with robbing William Tucker.

It appeared that the prisoners were out poaching in the night in company with Williams, and that Tucker, who was the game-keeper of Mr. West, met them as he was going his rounds, when the whole party set upon him and beat him till he was senseless; and that, on his recovering, he missed his pocket-book and money, and his gun. However, to connect some of the prisoners with the offence, an accomplice was called, who stated that they all beat the game-keeper, and left him lying on the ground; and that, after they had gone some little distance, Williams returned and robbed him.

PARK, J. It appears to me that Williams is alone guilty of this robbery. It appears that there was no common intent to steal the keeper's property. They went out with a common intent to kill game, and perhaps to resist the keepers; but the whole intention of stealing the property is confined to Williams alone. They must be acquitted of the robbery. *Verdict, Not Guilty.*

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[1] See Lamb v. People, 96 Ill. 73; People v. Knapp, 26 Mich. 112; Mercersmith v. State, 8 Tex. App. 211; Watts v. State, 5 W. Va. 532. — ED.

PEOPLE *v.* KEEFER.

SUPREME COURT OF CALIFORNIA. 1884.

[*Reported* 65 *Cal.* 232].

McKINSTRY, J.[1] Counsel for defendant asked the court to charge the jury: —

"If you believe from the evidence that the defendant James Keefer was not present when the Chinaman Lee Yuen was killed by Chapman, and did not aid and abet in the killing, and that defendant, at the time or prior to the killing, had not conspired with Chapman to commit the act, and that he had not advised and encouraged Chapman therein, and that the killing was not done in pursuance of any conspiracy between this defendant and Chapman to rob said Chinaman, and that this defendant only assisted in throwing the dead body of the Chinaman into the creek, then you are instructed that, under the indictment, you must find the defendant not guilty."

It is to be regretted that the foregoing instruction was not given to the jury. Of course, if defendant had done no act which made him responsible for the murder, the mere fact that he aided in concealing the dead body would render him liable only as accessory after the fact, — an offence of which he could not be found guilty under an indictment for murder. However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.

Assuming the testimony of defendant to be true, there was evidence tending to show that no robbery was committed or attempted. In robbery, as in larceny, it must appear that the goods were taken *animo furandi;* and there was evidence tending to prove that his property was not taken from deceased *lucri causa*, or with intent to deprive him of it permanently. So also there was evidence tending to prove that defendant was not personally present at the killing, and that the killing was not done in pursuance of any agreement or understanding to which defendant was a party, but that it was done by Chapman without the knowledge, assent, or connivance of the defendant.

The testimony of defendant was to the effect that he did not advise or encourage Chapman to follow and tie the deceased. But even if we could be supposed to be justified in deciding the fact, in holding that his conduct conclusively proved — notwithstanding his testimony to the contrary — that he did encourage Chapman in his purpose to follow and tie the deceased, such encouragement would not, of itself, make him accessory to the killing. An accessory before the fact to a robbery (or any other of the felonies mentioned in section 198 of the Penal Code), although not present when the felony is perpetrated or attempted, is guilty of a murder committed in the perpetration or attempt to perpetrate the felony. People *v.* Majors, April 1, 1884. This is by reason of the statute, and because the law superadds the intent to kill to the original felonious intent. People *v.* Doyell, 48 Cal. 94. One who has only advised or encouraged a misdemeanor, however, is not necessarily responsible for a murder committed by his co-conspirator, not in furtherance, but independent of the common design. 1 Whart. Crim. Law, § 229 and note.

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[1] Part of the opinion is omitted. — ED.

In the case at bar, if defendant simply encouraged the tying of the deceased, — a misdemeanor which did not and probably could not cause death or any serious injury, — as the killing by Chapman was neither necessarily nor probably involved in the battery or false imprisonment, nor incidental to it, but was an independent and malicious act with which defendant had no connection, the jury were not authorized to find defendant guilty of the murder, or of manslaughter. If the deceased had been strangled by the cords with which he had been carelessly or recklessly bound by Chapman, or had died in consequence of exposure to the elements while tied, defendant might have been held liable. But, if the testimony of defendant was true, — and, as we have said, he was entitled to an instruction based upon the assumption that the facts were as he stated them to be, — the killing of deceased was an independent act of Chapman, neither aided, advised, nor encouraged by him, and not involved in nor incidental to any act by him aided, advised, or encouraged. The court erred in refusing the instruction.

SPIES *v.* PEOPLE.

SUPREME COURT OF ILLINOIS. 1887.

[*Reported* 122 *Ill.* 1.]

MAGRUDER, J.,[1] delivered the opinion of the Court:

This case comes before us by writ of error to the Criminal Court of Cook county. The writ has been made a *supersedeas.*

Plaintiffs in error were tried in the summer of 1886 for the murder of Matthias J. Degan, on May 4, 1886, in the city of Chicago, Cook county, Illinois. On August 20, 1886, the jury returned a verdict finding the defendants, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, guilty of murder, and fixing death as the penalty. By the same verdict they also found Oscar W. Neebe guilty of murder and fixed the penalty at imprisonment in the penitentiary for fifteen years.

About the 1st day of May, 1886, the workingmen of Chicago and of other industrial centres in the United States were greatly excited upon the subject of inducing their employers to reduce the time during which they should be required to labor on each day to eight hours. In the midst of the excitement growing out of this eight-hour movement, as it was called, a meeting was held on the evening of May 4, 1886, at the Haymarket, on Randolph street, in the West division of the city of Chicago. This meeting was addressed by the defendants Spies, Parsons, and Fielden. While the latter was making the closing speech, and at some point of time between ten and half-past ten o'clock in the evening, several companies of policemen, numbering one hundred and eighty men, marched into the crowd from their station on Desplaines street, and ordered the meeting to disperse. As soon as the order was given, some one threw among the policemen a dynamite bomb which struck Degan, who was one of the police officers, and killed him. As the result of the throwing of the bomb and of the firing of pistol shots, which immediately succeeded the throwing of the bomb, six policemen besides Degan were killed, and sixty more were seriously wounded.

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[1] Part of the opinion only is given. — ED.

It is undisputed that the bomb was thrown and that it caused the death of Degan. It is conceded that no one of the convicted defendants threw the bomb with his own hands. Plaintiffs in error are charged with being accessories before the fact. There are sixty-nine counts in the indictment. Some of the counts charge that the eight defendants above named, being present, aided, abetted, and assisted in the throwing of the bomb; others, that, not being present, aiding, abetting or assisting, they advised, encouraged, aided, and abetted such throwing. Some of the counts charge that said defendants advised, encouraged, aided, and abetted one Rudolph Schnaubelt in the perpetration of the crime; others that they advised, encouraged, aided, and abetted an unknown person in the perpetration thereof.

The Illinois statute upon this subject is as follows (chap. 38, div. 2, secs. 2 and 3):

"Sec. 2. An accessory is he who stands by, and aids, abets, or assists, or who, not being present, aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of the crime. He who thus aids, abets, assists, advises, or encourages shall be considered as principal, and punished accordingly.

"Sec. 3. Every such accessory, when a crime is committed within or without this State, by his aid or procurement in this State, may be indicted and convicted at the same time as the principal, or before, or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal."

This statute abolishes the distinction between accessories before the fact and principals; by it all accessories before the fact are made principals. As the acts of the principal are thus made the acts of the accessory, the latter may be charged as having done the acts himself, and may be indicted and punished accordingly. Baxter *v.* People, 3 Gilm. 368; Dempsey *v.* People, 47 Ill. 323.

If, therefore, the defendants advised, encouraged, aided, or abetted the killing of Degan, they are as guilty as though they took his life with their own hands. If any of them stood by and aided, abetted, or assisted in the throwing of the bomb, those of them who did so are as guilty as though they threw it themselves.

It is charged that the defendants formed a common purpose, and were united in a common design to aid and encourage the murder of the policemen among whom the bomb was thrown. If they combined to accomplish such murder by concerted action, the ordinary law of conspiracy is applicable, and the acts and declarations of one of them, done in furtherance of the common design, are, in contemplation of law, the acts and declarations of all. This prosecution, however, is not for conspiracy as a substantive crime. Proof of conspiracy is only proper so far as it may tend to show a common design to encourage the murder charged against the prisoners. It may be introduced for the purpose of establishing the position of the members of the combination as accessories to the crime of murder.

The questions which thus present themselves at the threshold of the case are these: Did the defendants have a common purpose or design to advise, encourage, aid, or abet the murder of the police? Did they combine together and with others with a view to carrying that purpose or design into effect? Did they or either or any of them do such acts or make such declarations in furtherance of the common purpose or design as did actually have the effect of encouraging, aiding, or abetting the crime in question? . . .

It is apparent from this review of the evidence that just such an attack was made at the Haymarket as was contemplated and arranged for by the conspiracy of Monday night. First, a bomb was thrown among the policemen; next, shots were fired into their ranks by armed men, belonging to the organization heretofore described and who had been gathered around the wagon during the evening. In the order of time, the shooting occurred a few seconds after the bomb exploded. This was the order in which the onset with the two different kinds of weapons was to be made, according to the terms of the conspiracy. The mode of attack as made corresponded with the mode of attack as planned.

It is true that the plan adopted contemplated the throwing of a bomb into each station and then shooting down the police, as they should come out. This was to be done, however, not only at the North avenue station, but at the stations "in other parts of the city." The Desplaines street station was a station in one of the "other parts of the city," and was as much embraced within the scope of the plan as the rest of the stations. It was in sight of the speakers' wagon, and only a short distance south of it. If a bomb had been thrown into the station itself and the policemen had been shot down while coming out, a part of the conspiracy would have been literally executed just as it was agreed upon. It could make no difference in the guilt of those who were parties to the conspiracy that the man who threw the bomb and his confederates who fired the shots waited, before doing their work, until the policemen in the station had left it and had advanced some three hundred feet north of it.

If A hire B to shoot C at the Sherman House in the city of Chicago on a certain night, but B, seeing C enter the Tremont House on the same night, shoots him there, A is none the less guilty of aiding, abetting, advising, and encouraging the murder of C. If there is a conspiracy to kill policemen at a station house, but the agents of the conspiracy kill the policemen a short distance away from the station house, there is no such departure from the original design as to relieve the conspirators of responsibility.

A plan for the perpetration of a crime or for the accomplishment of any action, whether worthy or unworthy, can not always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies and unforeseen contingencies. . . .

Lingg:

The jury were warranted in believing from the evidence that the plaintiff in error, Louis Lingg, was a party to the Monday night conspiracy. . . .

Here is a man, connected with a certain organization, engaged in arming and drilling for a conflict with the police. He is experimenting with dynamite and in the construction of bombs under the direction of armed members of that organization. He makes bomb shells, fills them with dynamite, takes them to the meeting place of armed members of that organization, puts them where access to them can be easily had, using such precautions as such dangerous explosives naturally require. At once, certain of these armed members, such as the two large men of the Lehr und Wehr Verein already spoken of, come forward and take bombs and go their several ways. In a little more than an hour afterwards, one of these very bombs is thrown into a crowd of policemen and explodes and kills one of them. Was not the conduct of this man, who thus coolly and carefully prepared the weapons for one definite class of men to use in the murder of another definite class of men, marked by "deliberation," as that term is defined in the authorities?

It was a fair conclusion from the evidence that Lingg knew that the bombs he was making would be thrown among the police. It was a fair conclusion from the evidence that he intended the bombs he placed in the hall-way to be used by the members of the International groups, not only in the interest of the general movement against the police with which he was connected, but in the interest of the particular conspiracy that was concocted on Monday night.

Even if he did not know the name of the particular individual who was to throw the bomb, he knew that it would be thrown by some one belonging to the sections or groups already described, and this was sufficient to affect him with the guilt of advising, encouraging, aiding, or abetting the crime charged in the indictment.

He may not have known what particular policeman would be killed, whether Matthias J. Degan, or another. But when he opened the loaded satchel at Neff's Hall on Tuesday night, that act, viewed in the light of all the antecedent, attendant, and subsequent occurrences, was virtually a designation of the body or class of men who were to be attacked. When one of such class was killed, the guilt was the same as though a person bearing a particular name had been pointed out as the victim.

Even if he did not know that one of the bombs would be thrown on that evening at a particular place called the Haymarket, it was sufficient that he knew it was to be used at that point in the city, where a collision should occur between the workingmen and the police. Such a collision did occur at the Haymarket. . . .

Fielden:

There is evidence of a very distinct and positive character that Fielden shot at the police. . . .

It is true that Degan was killed by the bomb that was thrown and not by the shots that were fired. But the attack at the Haymarket was a joint attack made by a number of persons with two different kinds of weapons in pursuance of a previously arranged conspiracy. When Fielden lent himself to the execution of that conspiracy by participating in the joint attack, he was just as guilty of the murder of Degan by reason of firing his pistol as though he had thrown the bomb. If the man who threw the bomb and the twenty men whom officer Hanley saw running into the alley had stood up together and the one had thrown his bomb and the others had fired their shots all at the same time into the ranks of the police, and one of the policemen had at once fallen dead, would not each of the twenty men have been as responsible as the bomb-thrower for the death of the man killed, whether such death was caused by the bomb or by the shots? All had the murderous intent. All were using deadly weapons in pursuance of a common design to destroy life. The conduct of Fielden at the Haymarket, considered in connection with his acts prior thereto and with all the other facts, as herein set forth, certainly warranted the jury in finding that he was one of the conspirators.

Parsons:

The jury were warranted in believing from the evidence that the defendant Parsons was associated with the man who threw the bomb and the men who fired the shots at the Haymarket, in a conspiracy to bring about a social revolution in Chicago by force on or about May 1, 1886, or, in other words, to destroy the police and militia on or about that date with bombs and revolvers or rifles. It is well settled that, when the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all. Nudd *v.* Burrows, 91 U. S. 426; 1 Wharton's Am. Crim. Law (6th ed.), sec. 702; 3 Greenleaf on Evidence, sec. 94.

It makes no difference, that Parsons may not have been present in the basement of Grief's Hall when the Monday night conspiracy was planned. He belonged to the armed sections, whose representatives entered into that conspiracy and was one of the absent members, who were to be informed of its provisions. One of those provisions was the holding of a meeting at the Haymarket. When he went to that meeting in obedience to a summons from Rau, and there made an incendiary speech, he joined the others in their execution of the conspiracy and thereby became a party to it. "Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage, by whom it is perpetrated, are principals when the killing is in pursuance of the common design." Wharton on Homicide (2d ed.), sec. 201; Wharton's Am. Law of Homicide, 345, 346, etc.; Regina *v.* Jackson, 7 Cox, C. C. 357; Commonwealth *v.* Daley, 4 Pa. L. J. 150.

The plan adopted on Monday night was merely a specific mode of carrying out the more general conspiracy to which Parsons and those present on Monday night were all parties. The adoption of the Monday night plot was the act of those who were co-conspirators with Parsons. It was therefore his act. He had advised the use of bombs and arms against the police on or about May 1. The men who met Monday night merely indicated more specifically the time when and places where and mode in which such bombs and arms should be used, so as to be most effective. "A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable." 1 Bishop on Crim. Law, 636, and cases cited.

"There might be no special malice against the party slain, nor deliberate intention to hurt him; but if the fact was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow." (Foster, p. 351, sec. 6.) "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." State *v.* McCahill, 72 Iowa, 111.

He who enters into a combination or conspiracy to do such an unlawful act as will probably result in the unlawful taking of human life, must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. 1 Wharton on Crim. Law (9th ed.), sec. 225 a; Brennan et al. *v.* The People, 15 Ill. 511; Hanna *v.* The People, 86 id. 243; Lamb *v.* The People, 96 id. 74.

Instruction.

According to the theory of this instruction,[1] the defendants conspired to excite certain classes to tumult, riot, use of weapons, and taking of life, "as a means to carry their designs and purposes into effect." The instruction does not specify what those designs and purposes are, because they had been stated in the two preceding instructions to be the bringing about of a social revolution and the destruction of the authorities of the city. The ordinary workingman had two purposes in view, first, to get an eight-hour day of labor, second, to keep the police from interfering to protect non-union laborers against strikers. The defendants in this case cared nothing about the eight-hour movement or the contentions between union and non-union men. They looked beyond to the social revolution. They sought to make use of the excitement among the workingmen over the eight-hour movement and over the attacks of police upon strikers, in order to create riot and tumult and thus precipitate the social revolution. The stirring up of riot and tumult was with them a means to an end. There is testimony tending to support this view. The men who excited the tumult and riot by print and speech may have had a different end in view from that sought by the classes whom they so excited. But they were none the less responsible for murder that resulted from their aid and encouragement.

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[1] If these defendants, or any two or more of them, conspired together, with or not with any other person or persons, to excite the people or classes of the people of this city to sedition, tumult, and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly, by print or speech, advised or encouraged the commission of murder, without designating time, place, or occasion at which it should be done, and in pursuance of, and induced by such advice or encouragement, murder was committed, then all of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice or encouragement, and was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any, advantage to themselves or others the conspirators proposed as the result of their conspiracy; nor does it matter whether such advice and encouragement had been frequent and long-continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy as in this instruction is recited, such advice or encouragement was given, and murder committed in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success its end and aims were, nor how foolish nor ill-arranged were the plans for its execution, except as bearing upon the question whether there was or was not such conspiracy.

If the defendants, as a means of bringing about the social revolution and as a part of the larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in Chicago into sedition, tumult, and riot and to the use of deadly weapons and the taking of human life, and for the purpose of producing such tumult, riot, use of weapons, and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor.

Judgment affirmed.

PEOPLE *v.* ELDER.

SUPREME COURT OF MICHIGAN. 1894.

[*Reported* 100 *Mich.* 515.]

HOOKER, J. Respondent appeals from a conviction of manslaughter. He was a bartender, and, in an altercation with the deceased, struck him and knocked him down, whereupon one Nixon, a bystander, kicked him, from which kick death resulted. The theory of the prosecution was that there was preconcert of action on the part of Nixon and the respondent. The respondent denies this; claiming that he had no reason to expect any assistance from Nixon, or to anticipate his interference, and that he did not induce it.

In his charge to the jury, the trial judge said, "On the part of the defendant, I give you the instructions which I now read." This was followed by the reading of several requests, in which the law was stated correctly upon the subject. The fifth was as follows:

"If it shall appear to you from the evidence that Elder did not himself inflict the blow or do the injury which resulted in the death of Lowden, and that Nixon, by his own motion, while the encounter between Elder and Lowden was going on, rushed in, uninvited by Elder, and inflicted the injuries which produced Lowden's death, then you must acquit the prisoner."

To this the court added as follows:

"Unless you find that his assault upon Lowden contributed and produced the conditions that deprived the deceased of the power of resistance, and enabled Nixon the better to inflict great bodily injury on the deceased, if you find that the cause of death was the wounds or injury he received on that occasion."

The requests upon the part of the respondent were followed by those of the prosecution, twenty-two in number, most of which were given, and which seem to have concluded the charge. The first was as follows:

"If you find that the respondent assaulted Lowden, and felled him to the floor, putting the body of the deceased in such a position that he was helpless to protect himself from Nixon, and rendered it possible for Nixon to kick him, such act upon the respondent's part was unlawful; and if decedent's death was caused by the defendant's act, the kicking given by Nixon, or both combined, then they are equally guilty of the death caused."

This request, and the addition to respondent's fifth request, were in direct contradiction of the earlier requests given upon respondent's part, wherein the jury were instructed that the respondent could not be convicted if the death was caused by acts of Nixon, for which respondent was not responsible, and which he did not induce or anticipate. The discussion of this subject, which appears to have been the important point in the case, was left with the requests and the addition which has been mentioned.

We fear that the jurors were misled by the first request of the prosecution, which in plain terms told them they might convict the respondent if he had "assaulted Lowden and felled him to the floor, putting his body in such a position that he was helpless to protect himself from Nixon, and rendered it possible for Nixon to kick him," if such kick caused death. Equally faulty was the implication contained in the addition to respondent's fifth request, — that if respondent's assault "deprived the deceased of the power of resistance, and enabled Nixon the better to inflict great bodily injury on the deceased," a conviction might follow.

The case of People *v.* Carter, 96 Mich. 583, which seems to have been relied upon by the prosecution, was quite a different case from this. In that case the respondent felled the deceased by a blow while he was engaged in a fight with another, whereupon that other immediately kicked him. It was held that if the jury could find that the respondent volunteered to aid another in his fight, for the purpose of aiding him to whip the deceased, they were joint wrong-doers, responsible for each other's acts. In this case the respondent's contention was that he was not a volunteer in another's cause, but that the other volunteered in his, without his request or expectation. He was entitled to have his theory properly submitted to the jury.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

STATE *v.* TAYLOR.

SUPREME COURT OF VERMONT. 1896.

[*Reported* 70 *Vt.* 1.]

INDICTMENT for an assault with intent to kill and murder. Trial by jury at the May Term, 1895, Windsor County, TAFT, J., presiding. Verdict and judgment of guilty, and sentence imposed at the respondents' request. The respondents excepted.

MUNSON, J.[1] The alleged assault was committed upon Paul Tinkham, constable of Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant, on suspicion of felony.

We think there was also error in the instruction given as to the liability of all for the act of one. The court charged in substance that if the four persons whom the officers were attempting to arrest were acting together with a common purpose of resisting arrest, and any one of the four shot an officer in the execution of that design and with an intent to kill, and the other three were present, assisting in the assault, all would be guilty of an assault with that intent. Assuming that the charge as a whole was sufficient to require the finding of an actual intent to take life on the part of one, it will be seen that the liability of the others for an assault with intent to take life is made to depend solely upon the illegality of the resistance. It is doubtless true that if all were combined for an unlawful resistance to the officers, and an officer had been killed by one of their number, all would have been guilty of the killing. But no one was killed; and the liability of the actual assailant, other than for a simple assault, depended upon the existence of a specific intent to kill. We think the jury could not be permitted to return a verdict of guilty of an assault with intent to murder against all, on the mere finding of a common purpose to resist arrest. It would doubtless be different if it were found that they acted upon a common understanding that they would do whatever might be necessary to avoid arrest.

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[1] Only so much of the case as discusses the guilt of the accomplices is given.—ED.

CHAPTER VII.

CRIMES AGAINST THE PERSON.

SECTION I.

General Principles.

1 Hale, Pleas of the Crown, 425. To make up the crime of homicide or murder there must be these three concurring circumstances: —

1. The party must be killed. Anciently indeed a barbarous assault with an intent to murder, so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason (15 E. 2, Coron. 383); but that holds not now, for the stroke without the death of the party stricken, nor the death without the stroke or other violence makes not the homicide or murder, for the death consummates the crime. . . .

Now what shall be said a killing and death within the year and day? . . .

If a man, either by working upon the fancy of another or possibly by harsh or unkind usage, puts another into such passion of grief or fear that the party either dies suddenly, or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God; and hence it was, that before the statute of 1 Jac. cap. 12, witchcraft or fascination was not felony, because it wanted a trial, though some constitutions of the civil law make it penal. . . .

There are several ways of killing: 1. By exposing a sick or weak person or infant unto the cold to the intent to destroy him (2 E. 3, 18 b), whereof he dieth. 2. By laying an impotent person abroad, so that he may be exposed to and receive mortal harm; as laying an infant in an orchard and covering it with leaves, whereby a kite strikes it, and kills it. 6 Eliz., Crompt. de Pace 24; Dalt. ch. 93. 3. By imprisoning a man so strictly that he dies, and therefore where any dies in gaol, the coroner ought to be sent for to enquire the manner of his death. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noisome and poisonous filth at a man's door, to the intent by a poisonous air to poison him (Mr. Dalton, ch. 93, out of Mr. Coke's reading). 8. By strangling or suffocation. *Moriendi mille figurae.*

A man infected with the plague, having a plague-sore running upon him, goes abroad ; this is made felony by the statute of 1 Jac. cap. 31, but is now discontinued ; but what if such person goes abroad, to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might be a question ; but if no such intention evidently appears, though *de facto* by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanor ; and the reasons are : 1. Because it is hard to discern whether the infection arise from the party or from the contagion of the air,— it is God's arrow ; and 2. Nature prompts every man, in what condition soever, to preserve himself, which cannot be well without mutual conversation. 3. Contagious diseases, as plague, pestilential fevers, small-pox, &c., are common among mankind by the visitation ; and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments.

II. The second consideration that is common both to murder and manslaughter is, who shall be said a person, the killing of whom shall be said murder or manslaughter.

If a woman be quick or great with child, if she takes or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet *in rerum natura,* though it be a great crime, and by the judicial law of Moses was punishable with death nor can it legally be made known, whether it were killed or not. 22 E 3, Coron. 263. So it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 E. 3, 23 b, Coron. 146. . . . If a man kills an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.

III. The third inquiry is, who shall be said a person killing. . . .

If there be an actual forcing of a man, as if A. by force take the arm of B. and the weapon in his hand, and therewith stabs C. whereof he dies, this is murder in A. but B. is not guilty. Dalt. cap. 93, p. 242 Plowd. Com. 19 a. But if it be only a moral force, as by threatening, duress, or imprisonment, &c., this excuseth not.

1 Hawkins, Pleas of the Crown, ch. 16, sect. 2. Rape is an offence in having unlawful and carnal knowledge of a woman by force and against her will.

Ibid., ch. 19. Robbery is a felonious and violent taking away from the person of another goods or money to any value, putting him in fear.

Ibid., ch. 15, sect. 1, 2. Such hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary, is properly a maim. And therefore the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or fore-tooth, or castrating him, are said to be maims; but the cutting off his ear or nose, &c., are not esteemed maims, because they do not weaken, but only disfigure him.

Ibid., ch. 15, sect. 1, 2. An assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such-like act done in an angry, threatening manner: and from hence it clearly follows that one charged with an assault and battery may be found guilty of the former, and yet acquitted of the latter. But every battery includes an assault; therefore on an indictment of assault and battery in which the assault is ill laid, if the defendant be found guilty of the battery it is sufficient. Notwithstanding many ancient opinions to the contrary, it seems agreed at this day that no words whatsoever can amount to an assault.

It seems that any injury whatsoever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law.

SECTION II.

Assault and Battery.

REGINA *v.* RENSHAW.

SUSSEX ASSIZES. 1847.

[*Reported* 2 *Cox C. C.* 285.]

MARIA RENSHAW was indicted for a misdemeanor. The indictment contained also a count for a common assault.[1]

Attree, for the prosecution, stated that the prisoner, having been delivered of [a bastard] child ten days before, on the 26th of June left the child, swathed in a large piece of flannel at the bottom of a dry ditch, in a field in the parish of Bexhill, and then herself departed to Hastings, a place ten miles distant, where she was afterwards found. There was a pathway in the field by the ditch, and a lane separated from the ditch by a hedge, neither of which was much frequented The child was found alive.

The facts having been proved —

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[1] Only so much of the case as involves the question of assault is given. — ED.

Parke, B. (to the jury). There were no marks of violence on the child, and it does not appear, in the result, that the child actually experienced any injury or inconvenience, as it was providentially found soon after it was exposed; and therefore, although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet if that be so at all, it can only be when the person exposed suffers a hurt or injury of some kind or other from the exposure.

COMMONWEALTH *v.* WHITE.

Supreme Judicial Court of Massachusetts. 1872.

[*Reported* 110 *Massachusetts*, 407.]

Complaint to a trial justice, alleging that the defendant "with force and arms in and upon the body of Timothy Harrington an assault did make, and him did then and there threaten to shoot with a gun, which he then and there pointed and aimed at said Harrington."

At the trial, on appeal, in the Superior Court, before Pitman J., the Commonwealth introduced evidence tending to show that the defendant was driving in a wagon along a highway, which Harrington, one Sullivan, and others were repairing; that Sullivan called out to the defendant to drive in the middle of the road; that the defendant made an offensive reply; that thereupon Sullivan came toward the defendant and asked him what he meant; that Sullivan and Harrington were about fifteen feet from the defendant, who was moving along all the time; that the defendant took up a double-barrel gun which he had in the wagon, pointed it towards Sullivan and Harrington, took aim at them, and said, "I have got something here that will pick the eyes of you." This was all the evidence of declarations or threats of the defendant at the time of the alleged assault.

Sullivan testified that he had no fear and did not suppose the defendant was going to do any harm; but there was evidence tending to show that Harrington was put in fear. The defendant testified that the gun was not loaded.

The defendant asked the judge to rule that the complaint could not be sustained because the Commonwealth had failed to prove the offence as alleged in the complaint; but the judge refused so to rule, and ruled that it was not necessary to prove a threat to shoot as set forth in the complaint.

The defendant also asked the judge to instruct the jury "that the facts testified to did not constitute an assault; that at the time, the defendant must have had an intention to do some bodily harm to Harrington and the present ability to carry his intention into execution; and that the whole evidence would not warrant the jury in finding a verdict against the defendant." But the judge refused so to instruct the jury, and instructed them "that an assault is any unlawful physical force partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury; and that if the defendant, within shooting distance, menacingly pointed at Harrington a gun, which Harrington had reasonable cause to believe was loaded, and Harrington was actually put in fear of immediate bodily injury therefrom, and the circumstances of the case were such as ordinarily to induce such fear in the mind of a reasonable man, that then an assault was committed, whether the gun was in fact loaded or not." The jury returned a verdict of guilty, and the defendant alleged exceptions.

WELLS, J.[1] The instructions required the jury to find that the acts of the defendant were done "menacingly;" that Harrington had reasonable cause to believe the gun pointed at him was loaded, and was actually put in fear of immediate bodily injury therefrom; and that the circumstances were such as ordinarily to induce such fear in the mind of a reasonable man.

Instructions in accordance with the second ruling prayed for would have required the jury also to find that the defendant had an intention to do some bodily harm and the present ability to carry his intention into execution. Taking both these conditions literally, it is difficult to see how an assault could be committed without a battery resulting.

It is not the secret intent of the assaulting party nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace.[2] *Exceptions overruled.*

PEOPLE *v.* MOORE.

SUPREME COURT OF NEW YORK. 1888.

[*Reported* 50 *Hun*, 356.]

LANDON, J.[3] The material facts are not in dispute. The main questions are whether the conceded facts show that the defendant committed an assault upon the complainant, and if so, whether the assault was justifiable.

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[1] Arguments of counsel and part of the opinion are omitted.

[2] *Acc.* State *v.* Shepard, 10 Ia. 126; State *v.* Smith, 2 Humph. 457. *Contra,* Chapman *v.* State, 78 Ala. 463; State *v.* Sears, 86 Mo. 169; State *v.* Godfrey, 17 Or. 300; and see a learned note, 2 Green Cr. L. Rep. 271. — ED.

[3] Only so much of the opinion is given as involves the question of assault.

The defendant was in the employ of the Burden Ore and Iron Company. This company owns a large tract of land in Livingston, Columbia county, and has, in the development of its business, created upon its lands, the so-called village of Burden. This consists of the company's offices, shops, sixty or seventy tenement-houses, occupied by its servants and their families, a public store, schoolhouse and chapel. A post-office is established there. An open road or street, wholly upon the company's lands, leads from the public highway to the village. The tenement-houses of the village are in rows upon both sides of the village streets. All these streets and roads are open, and to every appearance are public highways. The company, however, retains title to the land, and the public authorities have not claimed or assumed any authority over them.

The complainant Snyder was a peddler of milk and vegetables and had customers for his supplies in this village. The company desired him to discontinue his traffic in the village, and to give it to another person. It notified him that the village and its streets were its private property, and that he must not sell milk there any more. He refused to discontinue. The company directed the defendant to keep him out of the village, but to use no more force than was necessary for the purpose, and to be careful not to do him personal injury. The defendant, in pursuance of this direction, assisted by one Ahlers, on the 14th day of March, 1887, intercepted Snyder upon the road leading from the public highway to the village. Snyder was alone, was seated in his sleigh driving his team of horses on his way to deliver milk to his customers, and especially some apples which had been ordered by one of them. The defendant told Snyder he was trespassing and that he had orders to stop him. Snyder attempted to drive on. The defendant then seized the lines in front of Snyder's hands, told Ahlers to take the horses by the heads and turn them around, which Ahlers immediately did, the defendant at the same time remarking that "the easiest way is the best way." When the team and sleigh, with Snyder in it, had been turned around, defendant barred the passage towards the village with an iron pipe. Snyder thereupon drove away.

Defendant urges that this was no assault, for the reason that there was no intention to hurt Snyder; and that he did not lay his hands upon him. It is plain, however, that the force which he applied to the horses and sleigh just as effectually touched the person of Snyder, as if he had taken him by his ears or shoulders and turned him right about face. The horses and sleigh were the instruments with which he directed and augmented his personal and physical force against, and upon the body of Snyder. Snyder did receive bodily harm. One receives bodily harm, in a legal sense, when another touches his person against his will with physical force, intentionally hostile and aggressive, or projects such force against his person. Here, for the moment, Snyder was deprived by the defendant of his own control of his own person; and he was controlled, intimidated, and coerced by the hostile, aggressive physical force of the defendant. The offer to prove that bodily harm was not intended was made in the face of the defendant's testimony that he intended to do just what he did do. The obvious purpose was to prove that there was no intention to wound or bruise the defendant, or cause him physical pain. So long as this was not claimed or proved on the part of the prosecution, disproof of it was properly rejected for the reason that such disproof would have raised or suggested a false and immaterial issue, tending possibly to the miscarriage of justice.

We assume that if Snyder was a trespasser the assault was justifiable, for no more force was used than was reasonably necessary to eject him from the premises; but he was not a trespasser. The streets leading to and about this village were made and opened by the Burden Iron and Ore Company for such public use as was incident to the wants, convenience, and happiness of the people residing there. To the extent of this public use the company subjected its private property to the law which regulates public rights. Munn *v.* Illinois, 94 U. S., 113. No doubt it can depopulate its village and restore its lands to the solitude of its exclusive private dominion; but as long as it enjoys the benefits of public association and communication it must accept the burdens necessarily and properly incident to them. By reserving the legal title to the thoroughfares of its village, it does not reserve autocratic powers over the people residing along them. To prevent the members of its community from buying supplies of Snyder, or of any tradesman not nominated by the company, would be to introduce a condition of vassalage inconsistent with our free institutions. If these families may buy of Snyder, then he may deliver his wares to them, and use for the purpose the appropriate thoroughfares. The assault was, therefore, not justifiable.

SECTION III

Rape.

COMMONWEALTH *v.* BURKE

Supreme Judicial Court of Massachusetts. 1870.

[*Reported* 105 *Massachusetts*, 376.]

Gray, J. — The defendant has been indicted and convicted for aiding and assisting Dennis Green in committing a rape upon Joanna Caton. The single exception taken at the trial was to the refusal of the presiding judge to rule that the evidence introduced was not sufficient to warrant a verdict of guilty. The instructions given were not objected to, and are not reported in the bill of exceptions. The only question before us therefore is, whether, under any instructions applicable to the case, the evidence would support a conviction.

That evidence, which it is unnecessary to state in detail, was sufficient to authorize the jury to find that Green, with the aid and assistance of this defendant, had carnal intercourse with Mrs. Caton, without her previous assent, and while she was, as Green and the defendant both knew, so drunk as to be utterly senseless and incapable of consenting, and with such force as was necessary to effect the purpose.

All the statutes of England and of Massachusetts, and all the text-books of authority which have undertaken to define the crime of rape, have defined it as the having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier and more weighty authorities show that the words "against her will," in the standard definitions, mean exactly the same thing as "without her consent;" and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded.

The most ancient statute upon the subject is that of Westm. I. c. 13, making rape (which had been a felony at common law) a misdemeanor, and declaring that no man should "ravish a maiden within age, neither by her own consent, nor without her consent, nor a wife or maiden of full age, nor other woman, against her will," on penalty of fine and imprisonment, either at the suit of a party or of the king. The St. of Westm. II. c. 34, ten years later, made rape felony again, and provided that if a man should "ravish a woman, married, maiden, or other woman, where she did not consent, neither before nor after," he should be punished with death, at the appeal of the party; "and likewise, where a man ravisheth a woman, married lady, maiden, or other woman, with force, although she consent afterwards," he should have a similar sentence upon prosecution in behalf of the king.

It is manifest upon the face of the Statutes of Westminster, and is recognized in the oldest commentaries and cases, that the words "without her consent" and "against her will" were used synonymously; and that the second of those statutes was intended to change the punishment only, and not the definition of the crime, upon any indictment for rape — leaving the words "against her will," as used in the first statute, an accurate part of the description. Mirror, c. 1, § 12; c. 3, § 21; c. 5, § 5; 30 & 31 Edw. I. 529-532; 22 Edw. IV. 22; Staunf. P. C. 24 a. Coke treats the two phrases as equivalent; for he says: "Rape is felony by the common law declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will or against her will;" although in the latter case the words of the St. of Westm. I. (as we have already seen) were "neither by her own consent, nor without her consent." 3 Inst. 60. Coke elsewhere repeatedly defines rape as "the carnal knowledge of a woman by force and against her will." Co. Lit. 123 b; 2 Inst. 180. A similar definition is given by Hale, Hawkins, Comyn, Blackstone, East, and Starkie, who wrote while the Statutes of Westminster were in force; as well as by the text-writers of most reputation since the St. of 9 Geo. IV. c. 31, repealed the earlier statutes, and, assuming the definition of the crime to be well established, provided simply that "every person convicted of the crime of rape shall suffer death as a felon." 1 Hale P. C. 628; 1 Hawk. c. 41; Com. Dig. Justices, S. 2; 4 Bl. Com. 210; 1 East P. C. 434; Stark. Crim. Pl. (2d ed.) 77, 431; 1 Russell on Crimes (2d Am. ed.), 556, (7th Am. ed.) 675; 3 Chit. Crim. Law, 810; Archb. Crim. Pl. (10th ed.) 481; 1 Gabbett Crim. Law, 831. There is authority for holding that it is not even necessary that an indictment, which alleges that the defendant "feloniously did ravish and carnally know" a woman, should add the words "against her will." 1 Hale P. C. 632; Harman *v.* Commonwealth, 12 S. & R. 69; Commonwealth *v.* Fogerty, 8 Gray, 489. However that may be, the office of those words, if inserted, is simply to negative the woman's previous consent. Stark. Crim. Pl. 431 note.

In the leading modern English case of The Queen *v.* Camplin, the great majority of the English judges held that a man who gave intoxicating liquor to a girl of thirteen, for the purpose, as the jury found, "of exciting her, not with the intention of rendering her insensible, and then having sexual connection with her," and made her quite drunk, and, while she was in a state of insensibility, took advantage of it, and ravished her, was guilty of rape. It appears indeed by the judgment delivered by Patteson, J., in passing sentence, as reported in 1 Cox Crim. Cas. 220, and 1 C. & K. 746, as well by the contemporaneous notes of Parke, B., printed in a note to 1 Denison, 92, and of Alderson, B., as read by him in The Queen *v.* Page, 2 Cox Crim. Cas. 133, that the decision was influenced by its having been proved at the trial that, before the girl became insensible, the man had attempted to procure her consent, and had failed. But it further appears by those notes that Lord Denman, C. J., Parke, B., and Patteson, J., thought that the violation of any woman without her consent, while she was in a state of insensibility and had no power over her will, by a man knowing at the time that she was in that state, was a rape, whether such state was caused by him or not; for example, as Alderson, B., adds, "in the case of a woman insensibly drunk in the streets, not made so by the prisoner." And in the course of the argument this able judge himself said that it might be considered against the general presumable will of a woman, that a man should have unlawful connection with her. The later decisions have established the rule in England that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether that state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape. The Queen *v.* Ryan, 2 Cox Crim. Cas. 115; Anon. by Willes, J., 8 Cox Crim. Cas. 134; Regina *v.* Fletcher, ib. 131; s. c. Bell, 63; Regina *v.* Jones, 4 Law Times (N. S.) 154; The Queen *v.* Fletcher, Law Rep. 1 C. C. 39; s. c. 10 Cox Crim. Cas. 248; The Queen *v.* Barrow, Law Rep. 1 C. C. 156; s. c. 11 Cox Crim. Cas. 191. Although in Regina *v.* Fletcher, *ubi supra*, Lord Campbell, C. J. (ignoring the old authorities and the repealing St. of 9 Geo. IV.) unnecessarily and erroneously assumed that the St. of Westm. II. was still in force; that it defined the crime of rape; and that there was a difference between the expressions "against her will" and "without her consent," in the definitions of this crime, — none of the other cases in England have been put upon that ground, and their judicial value is not impaired by his inaccuracies.

The earliest statute of Massachusetts upon the subject was passed in 1642, and, like the English Statutes of Westminster, used "without consent" as synonymous with "against her will," as is apparent upon reading its provisions, which were as follows: 1st "If any man shall unlawfully have carnal copulation with any woman child under ten years old, he shall be put to death, whether it were with or without the girl's consent." 2d "If any man shall forcibly and without consent ravish any maid or woman that is lawfully married or contracted, he shall be put to death." 3d "If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her will, that is above the age of ten years, he shall be either punished with death, or with some other grievous punishment, according to circumstances, at the discretion of the judges." 2 Mass. Col. Rec. 21. Without dwelling upon the language of the first of these provisions, which related to the abuse of female children, it is manifest that in the second and third, both of which related to the crime of rape, strictly so called, and differed only in the degree of punishment, depending upon the question whether the woman was or was not married or engaged to be married, the legislature used the words "without consent," in the second provision, as precisely equivalent to "against her will," in the third. The later revisions of the statute have abolished the difference in punishment, and therefore omitted the second provision, and thus made the definition of rape in all cases the ravishing and carnally knowing a woman "by force and against her will." Mass. Col. Laws (ed. 1660), 9, (ed. 1672) 15; Mass. Prov. Laws, 1692-93 (4 W. & M.) c. 19, § 11; 1697 (9 W. III.) c. 18; (State ed.) 56, 296; St. 1805, c. 97, § 1; Rev. Sts. c. 125, § 18; Gen. Sts. c. 160, § 26. But they cannot upon any proper rule of construction of a series of statutes *in pari materiâ*, be taken to have changed the description of the offence. Commonwealth *v.* Sugland, 4 Gray, 7; Commonwealth *v.* Bailey, 13 Allen, 541, 545.

We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.[1] *Exceptions overruled.*

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[1] *Acc.* Reg. *v.* Champlin, 1 Den. C. C. 89; Reg. *v.* Fletcher, 8 Cox C. C. 131 (cf Reg. *v.* Fletcher, 10 Cox C. C. 248); Reg. *v.* Mayers, 12 Cox C. C. 311; Reg. *v.* Barratt, 12 Cox C. C. 498. But see a learned note on the subject, 1 Green Cr., L. Rep. 318. — ED.

SECTION IV.

Murder.

1 Hawkins, Pleas of the Crown, ch. 13, Sects. 1, 2. The word "murder" anciently signified only the private killing of a man, for which, by force of a law introduced by King Canute for the preservation of his Danes, the town or hundred where the fact was done was to be amerced to the king, unless they could prove that the person slain were an Englishman (which proof was called Engleschire), or could produce the offender, etc. And in those days the open wilful killing of a man through anger or malice, etc., was not called murder, but voluntary homicide.

But the said law concerning Engleschire having been abolished by 14 Edw. III. c. 4. the killing of any Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Rich. II. c. 1, which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and, in the body of the Act, expresses the same by "murder, or killing by await, assault, or malice prepensed." And doubtless the makers of 23 Hen. VIII. c. 1, which excluded all wilful murder of malice prepense from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder.

23 Hen. VIII. ch. 1, Sect. 3. Be it enacted by the King our sovereign lord, and the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That no person nor persons, which hereafter shall happen to be found guilty after the laws of this land, for any manner of petit treason, or for any wilful murder of malice prepensed, or for robbing of any churches, chapels, or other holy places, or for robbing of any person or persons in their dwelling-houses, or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same, or for robbing of any person or persons in or near about the highways, or for wilful burning of any dwelling-houses, or barns wherein any grain or corn shall happen to be, nor any person or persons being found guilty of any abetment, procurement, helping, maintaining, or counselling, of or to any such petit treasons, murders, or felonies, shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and suffer death in such manner and form as they should have done for any of the causes or offences abovesaid if they were no clerks; such as be within holy orders, that is to say, of the orders of sub-deacon or above, only except.

YONG'S CASE.

Queen's Bench. 1587.

[*Reported* 4 *Coke*, 40 *a*.]

In this case it was held *per totam curiam* that if, upon an affray, the constable and others in his assistance come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden; because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm. So if the sheriff or any of his bailiffs or other officers is killed in executing the process of the law, or in doing their duty, it is murder; the same law of a watchman, who is killed in the execution of his office.

REX *v.* TOMSON.

Old Bailey. 166–.

[*Reported Kelyng*, 66.]

At the sessions in the Old Bailey holden after Hilary Term, Caroli Secundi, Thomas Tomson was indicted for murdering of Allen Dawes, and the jury found a special verdict to this effect, viz., that the day, year, and place in the indictment mentioned, Thomas Tomson, the prisoner, and his wife were fighting in the house of the said Allen Dawes, who was killed, and the said Allen Dawes, seeing them fighting, came in and endeavored to part them, and thereupon the said Tomson thrust away the said Dawes, and threw him down upon a piece of iron, which was a bar in a chimney which kept up the fire, and by that one of the ribs of the said Dawes was broken, of which he died; and if the court judge this murder, they find so, or if manslaughter, then they find so.

And I put this case to my Lord Chief Justice, Baron Hales and my brother, and some other of my brethren, and we all agreed as it is resolved in Young's case, Co. 4. Report, and also in Mackally's case, Co. 9. Report, that if upon a sudden affray, a constable or watchman, or any that come in aid of them, who endeavor to part them, are killed, this is murder; and we hold likewise that if no constable or watchman be there, if any other person come to part them, and he be killed, this is murder; for every one in such case is bound to aid and preserve the king's peace. But in all those cases it is necessary that the party who was fighting and killed him that came to part them, did know or had notice given that they came for that purpose. As for the constable or other person who cometh to part them, to charge them in the king's name to keep the king's peace, by which they have notice of their intents; for otherwise if two are fighting, and a stranger runs in with intent to part them, yet the party who is fighting may think he cometh in aid of the other with whom he is fighting, unless some such notice be given as aforesaid, that he was a constable and came to part them: and that appeareth by Mackally's case before cited, where in case of an arrest by a sergeant, it is necessary, to make it murder, that the sergeant tell him that he doth arrest, for else if he doth say nothing, but fall upon the man and be killed by him, this is but manslaughter, unless it appear that the person arrested did know him to be a sergeant, and that he came to arrest him; for as the case is there put, if one seeing the sheriff or a sergeant whom he knoweth hath a warrant to arrest him, and to prevent it before the officer come so near as to let him know he doth arrest him, he shoots again at him, and kills him, this is murder; and in the principal case, though the jury find that Dawes came to part the man and wife, yet it doth not appear whether it is found that Tomson knew his intent, nor that Dawes spake any words whereby he might understand his intention, as charging them to keep the king's peace, etc., and so we held it to be only manslaughter, which in law is properly chance-medley, that is, where one man upon a sudden occasion kills another without malice in fact, or malice implied by law.

GREY'S CASE.

Old Bailey. 1666.

[*Reported Kelyng*, 64.]

John Grey being indicted for the murder of William Golding, the jury found a special verdict to this effect, viz.: We find that the day, year, and place in the indictment mentioned John Grey, the prisoner, was a blacksmith, and that William Golding, the person killed, was his servant, and that Grey his master commanded him to mend certain stamps, being part belonging to his trade, which he neglected to do; and the said Grey, his master, after coming in asked him the said Golding, why he had not done it, and then the said Grey told the said Golding, that if he would not serve him, he should serve in Bridewell, to which the said Golding replied, that he had as good serve in Bridewell as serve the said Grey his master; whereupon the said Grey, without any other provocation, struck the said Golding with a bar of iron, which the said Grey then had in his hand, upon which he and Golding were working at the anvil, and with the said blow he broke his skull, of which he died; and if this be murder, etc. This case was found specially by the desire of my Brother Wylde, and I showed the special verdict to all my Brethren, Judges of the King's Bench, and to my Lord Bridgman, Chief Justice of the Common Pleas. And we were all of opinion that this was murder. For if a father, master, or schoolmaster will correct his child, servant, or scholar, they must do it with such things as are fit for correction, and not with such instruments as may probably kill them. For otherwise, under pretence of correction, a parent might kill his child, or a master his servant, or a schoolmaster his scholar, and a bar of iron is no instrument for correction. It is all one as if he had run him through with a sword; and my Brother Morton said he remembered a case at Oxford Assizes before Justice Jones, then Judge of Assize, where a smith being chiding with his servant, upon some cross answer given by his servant, he having a piece of hot iron in his hand run it into his servant's belly, and it was judged murder, and the party executed. And my Lord Bridgman said, that in his circuit there was a woman indicted for murdering her child, and it appeared upon the evidence that she kicked her and stamped upon her belly, and he judged it murder. And my Brother Twisden said he ruled such a case formerly in Gloucester Circuit, for a piece of iron or a sword or a great cudgel, with which a man probably may be slain, are not instruments of correction. And therefore, when a master strikes his servant willingly with such things as those are, if death ensue, the law shall judge it malice prepense; and therefore the statute of 5 H. IV. c. 5, which enacts that if any one does cut out the tongue, or put out the eyes of any of the king's subjects of malice prepense, it shall be felony. If a man do cut out the tongue of another man voluntarily, the law judgeth it of malice prepense. And so where one man killeth another without any provocation, the law judgeth it malice prepense; and in the L. Morley's case in this book, it was resolved by all the judges, that words are no provocation to lessen the offence from being murder, if one man kill another upon ill words given to him. But if a parent, master, or schoolmaster, correct his child, servant, or scholar, with such things as are usual and fit for correction, and they happen to die, Poulton de Pace, p. 120, saith this is by misadventure, and cites for authority, Keilway, 108, a, b, & 136, a. But that book which puts this case in Keilway is 136, a, saith that if a master correct his servant, or lord his villain, and by force of that correction he dieth, although he did not intend to kill him, yet this is felony, because they ought to govern themselves in their correction in such ways that such a misadventure might not happen. And I suppose, because the word misadventure is there used, therefore Poulton concludeth (it may be truly) that it is but misadventure.

And in this principal case, upon certificate [by] many persons of good commendation of the general esteem that Grey had, I did certifie the King that though in strictness of law his offence was murder, yet it was attended with such circumstances as might render the person an object of his Majesty's grace and pardon, he having a very good report among all his own company of his own trade, and of all his neighbors; and upon this the King was pleased to grant him his pardon.

REGINA *v.* SERNÉ.

CENTRAL CRIMINAL COURT. 1887.

[*Reported* 16 *Cox C. C.* 311.]

THE prisoners Leon Serné and John Henry Goldfinch were indicted for the murder of a boy, Sjaak Serné, the son of the prisoner Leon Serné, it being alleged that they wilfully set on fire a house and shop, No. 274 Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné with his wife, two daughters, and two sons were living at the house in question; and that Serné, at the time he was living there, in midsummer, 1887, was in a state of pecuniary embarrassment, and had put into the premises furniture and other goods of but very little value, which at the time of the fire were not of greater value than £30. It also appeared that previously to the fire the prisoner Serné had insured the life of the boy Sjaak Serné, who was imbecile, and on the first day of September, 1887, had insured his stock at 274 Strand, for £500, his furniture for £100, and his rent for another £100; and that on the 17th of the same month the premises were burnt down.

Evidence was given on behalf of the prosecution that fires were seen breaking out in several parts of the premises at the same time, soon after the prisoners had been seen in the shop together, two fires being in the lower part of the house and two above, on the floor whence escape could be made on to the roof of the adjoining house, and in which part were the prisoners, and the wife, and two daughters of Serné, who escaped; that on the premises were a quantity of tissue transparencies for advertising purposes, which were of a most inflammable character; and that on the site of one of the fires was found a great quantity of these transparencies close to other inflammable materials; that the prisoner Serné, his wife and daughters, were rescued from the roof of the adjoining house, the other prisoner being rescued from a window in the front of the house, but that the boys were burnt to death, the body of the one being found on the floor near the window from which the prisoner Serné, his wife, and daughters had escaped, the body of the other being found at the basement of the premises.

Stephen, J. Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the wilful murder of the boy Sjaak Serné, a lad of about fourteen years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of wilful murder, inasmuch as you have heard something said about constructive murder. Now that phrase, gentlemen, has no legal meaning whatever. There was wilful murder according to the plain meaning of the term, or there was no murder at all in the present case. The definition of murder is unlawful homicide with malice aforethought, and the words "malice aforethought" are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is, the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person. Now it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony, that is to say, the setting of the house on fire in order to cheat the insurance company, or by conduct which to their knowledge was likely to cause death and was therefore eminently dangerous in itself, — in either of these cases the prisoners are guilty of wilful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot at a fowl with intent to steal it and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, while that part of the law under which the Crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her; that would be murder. I think that every one would say, in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think, in so saying, the law of England lays down a rule of broad, plain common-sense. Treat a murderer how you will, award him what punishment you choose, it is your duty, gentlemen, if you think him really guilty of murder, to say so. That is the law of the land, and I have no doubt in my mind with regard to it. There was a case tried in this court which you will no doubt remember, and which will illustrate my meaning. It was the Clerkenwell explosion case in 1868, when a man named Barrett was charged with causing the death of several persons by an explosion which was intended to release one or two men from custody; and I am sure that no one can say truly that Barrett was not justly hanged. With regard to the facts in the present case, the very horror of the crime, if crime it was, the abomination of it, is a reason for your taking the most extreme care in the case, and for not imputing to the prisoners anything which is not clearly proved. God forbid that I should, by what I say, produce on your minds, even in the smallest degree, any feeling against the prisoners. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance of your duty if, being satisfied with the evidence, you do not convict one or both the prisoners of wilful murder, and it is wilful murder of which they are accused. [The learned judge then proceeded to review the evidence. In the result the jury found a verdict of not guilty in respect to each of the prisoners.] *Verdict, not guilty.*

STATE *v.* SMITH.

COURT OF APPEALS OF SOUTH CAROLINA. 1847.

[*Reported* 2 *Strobhart*, 77.]

JAMES CARTER, on horseback, overtook a large and noisy crowd of men and women on foot. The prisoner, one of the crowd, fired a pistol, apparently at Carter, but did not hit him. The bullet struck and killed a negro boy who was sitting on a fence beside the road, unseen by the crowd.[1]

The prisoner was found guilty of murder, and appealed, on the grounds annexed: —

1. That his Honor, the presiding Judge, misdirected the jury in his charge, by stating the law to be "that if the prisoner shot at Carter, designing some *serious* injury, as the falling from his horse, it is murder."

2. That his Honor charged the jury that "if the prisoner shot at Carter without intending to kill or hurt him, it is manslaughter."

3. That his Honor charged the jury that "they might find the prisoner guilty of murder or manslaughter, or not guilty."

4. That the verdict was contrary to law and evidence.

Miller, for the motion.

McIver, Solicitor, *contra*.

EVANS, J. delivered the opinion of the court.

The jury having found the prisoner guilty of murder, there is no necessity to inquire whether he could have been convicted of manslaughter on this indictment. The first ground is, therefore, the only one necessary to be considered. The proposition presented by that ground is whether, supposing the prisoner "shot at Carter, designing to do him some serious injury, as the falling from his horse," he is guilty of the crime of murder. It is not denied that this question is the same as if he had killed Carter instead of the negro, for if one design to kill A. but by accident kills B. his crime is the same as if he had executed his intended purpose. It will be murder, or manslaughter, or self-defence, according to the circumstances. It is very clear that the intent with which an act is done very often gives character to the crime, but there is a legal conclusion drawn from the facts of the case, entirely independent of the intent of the party. Thus it is said in 2d Starkie Ev. 950, that "where the defence is that the death was occasioned by accident, the nature of the act which produced the death, and the real motive and intention of the prisoner, are the proper subjects of evidence, but the conclusion as to the quality of the offence, as founded upon such facts, is a question of law." The whole doctrine of constructive malice is founded on the same principle. If the act which produced the death be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law from these circumstances will imply malice, without reference to what was passing in the prisoner's mind at the time he committed the act. If one were to fire a loaded gun into a crowd, or throw a piece of heavy timber from the top of a house into a street filled with people, the law would infer malice from the wickedness of the act; so also the law will imply that the prisoner intended the natural and probable consequences of his own act; as, in the case of shooting a gun into a crowd, the law will imply, from the wantonness of the act, that he intended to kill some one, although it might have been done in sport. If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction that where the intention was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter. But in this case the act done indicated an intention to kill; it was calculated to produce that effect, and no other; death was the probable consequence, and did result from it, and I am of opinion there was no error in the charge of the Circuit Judge, that if the prisoner shot at Carter the crime was murder, although the prisoner may have designed only to do Carter "some serious injury, as the falling from his horse." The motion is therefore dismissed.

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[1] This statement is condensed from that of the reporter.

RICHARDSON, J., O'NEALL, J., WARDLAW, J., FROST, J., and WITHERS, J., concurred. *Motion dismissed.*

COMMONWEALTH *v.* WEBSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850.

[*Reported* 5 *Cush.* 296.]

THE defendant, professor of chemistry in the medical college in Boston, attached to the university at Cambridge, was indicted in the municipal court at the January term, 1850, for the murder of Dr. George Parkman, at Boston, on the 23d of November, 1849. The indictment having been transmitted to this court, as required by the Rev. Sts.

c. 136, § 20, the defendant was tried at the present term, before the Chief Justice, and Justices Wilde, Dewey, and Metcalf.[1]

The government introduced evidence that Dr. George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut Street, in Boston, in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before two o'clock of that day, when he was seen going towards and about to enter the medical college. That he did not return to his home. That on the next day a very active, particular, and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were offered for information about Dr. Parkman. That on the 30th of November, certain parts of a human body were discovered in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory. That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November. That the parts of a body so found resembled in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which had been dissected. That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted to his mouth by the same dentist a fortnight before his disappearance. That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant had said that on the 23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house that, if he would come to the medical college at half-past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half-past one o'clock on that day, at his laboratory in the medical college. That the defendant then had no means of paying, and that the notes were afterwards found in his possession.

The opinion of the court on the law of the case was given in the charge to the jury as follows: —

Shaw, C. J. Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in the largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful; it is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defence. But it is not necessary to dwell on these distinctions; it will be sufficient to ask attention to the two species of criminal homicide, familiarly known as murder and manslaughter.

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[1] Part of the case is omitted. — Ed.

In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute law of the commonwealth declares (Rev. Sts. c. 125, § 1) that "Every person who shall commit the crime of murder shall suffer the punishment of death for the same," yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully-considered distinctions and qualifications. For these, we resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution (c. 6, art. 6) declaring that all the laws which had theretofore been adopted, used, and approved, in the province or state of Massachusetts bay, and usually practiced on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government, or by the state legislature, they have the same force and effect as laws formally enacted.

By the existing law, as adopted and practiced on, unlawful homicide is distinguished into murder and manslaughter.

Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with *malice aforethought*, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation which, in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life.

From these two definitions it will be at once perceived that the characteristic distinction between murder and manslaughter is malice, express or implied. It therefore becomes necessary in every case of homicide proved, and in order to an intelligent inquiry into the legal character of the act, to ascertain with some precision the nature of legal malice, and what evidence is requisite to establish its existence.

Upon this subject the rule, as deduced from the authorities, is that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. On the other hand, if death, though wilfully intended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter.

In considering what is regarded as such adequate provocation, it is a settled rule of law that no provocation by words only, however opprobrious, will mitigate an intentional homicide so as to reduce it to manslaughter. Therefore, if, upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife, if death ensues, it is a homicide not mitigated to manslaughter by the circumstances, and so is homicide by malice aforethought within the true definition of murder. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words "malice aforethought," in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance.

In speaking of the use of a dangerous weapon, and the mode of using it upon the person of another, I have spoken of it as indicating an intention to kill him, or do him great bodily harm. The reason is this: Where a man, without justification or excuse, causes the death of another by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his act. Suppose, therefore, for the purpose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life; yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed. . . .

The true nature of manslaughter is that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood, or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice.

The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offence of murder.

HADLEY *v.* STATE.

SUPREME COURT OF ALABAMA. 1876.

[*Reported* 55 *Alabama*, 31.]

STONE, J.[1] — Mr. Wharton, the able author of the works on Criminal Law, and on Homicide, has contributed an article to the "Forum," April number, 1875, in which he attempts to show that there has been a revolution in criminal law, in the matter of presumed malice. In his work on Homicide, 2d ed., § 671, he asserts the same doctrine, and says, "If it be said that the use of a weapon, likely to inflict a mortal blow, implies, as a presumption of law, in its technical sense, a deadly design, this is an error; and *a fortiori* is it so when it is said the use of such a weapon implies a malicious design."

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[1] Part of the opinion only is given.

Malice, design, and motive, are, as a rule, but inferential facts. They are inferred from facts and circumstances positively proven. If direct, positive proof of them were required, it could rarely be given. Still, we know they exist; and when sufficient facts are in evidence to justify us in drawing such inference, we rest as securely in the conviction as if it were forced upon us by positive proof. The measure of evidence, however, to justify such abiding conviction, must be very full, — so full as to exclude every other reasonable hypothesis.

That every one must be held to intend the known consequences of his intentional act, is a recognized canon of moral accountability, and of municipal law. Malice, as an ingredient of murder, is but a formed design, by a sane mind, to take life unlawfully, without such impending danger, to be averted thereby, as will render it excusable, and without such provocation as will repel the imputation of formed design. Hence, when life is taken by the direct use of a deadly weapon, the canon, stated above, comes to its aid; and, if there be nothing else in the transaction — no qualifying or explanatory circumstance — the conclusion is irresistible that the killing was done pursuant to a formed design, — in other words, with malice aforethought; for malice, in such connection, is but the absence of impending peril to life or member, which would excuse the homicide, and of sufficient provocation to repel the imputation of its existence.

In Foster's Crown Law, it is said, "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth; and very right it is that the law should so presume." The same doctrine is affirmed in all the older writers and adjudications on criminal law.

Sir Wm. Blackstone (4 Com. 201) says: "We may take it for a general rule that all homicide is malicious, and, of course, amounts to murder, unless when justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse, or alleviation, it is incumbent on the prisoner to make out to the satisfaction of the court and jury."

In the case of Webster *v.* Commonwealth, 5 Cush. 206, the case stood on the naked proof of the homicide, without any of the attendant circumstances. Ch. J. Shaw declared the law as above quoted.

The case of People *v.* Schryver, 42 N. Y. 1, is a very careful and full collection and collation of authorities, English and American, and fully sustains the doctrine above declared. See also Tweedy *v.* State, 5 Iowa, 433; Silvus *v.* State, 22 Ohio St. 90. The case of Stokes *v.* The People, 53 N. Y. 164, properly understood, is not materially opposed to this view. The charge of the judge in that case invaded the province of the jury; and, in addition to this, the case was made to turn materially on the statutes of New York. The charge in that case went much beyond the principle above copied from the old authors.

The charge in the present case is precisely that which was given in the case of Murphy *v.* The State, 37 Ala. 142. In that case this court held that the charge was free from error. We are unwilling to depart from that decision, and, in doing so, from an old landmark which has for centuries withstood the test of time, and the combined wisdom of jurists on both sides of the Atlantic. There is a lamentable and growing laxity in the administration of the criminal law, which is seen and deplored by all good men. Life is not sufficiently cared for; its destruction not punished with sufficient severity. Until the reckless and rash are taught, by firm judges and stern juries, that the slayer of his brother can invoke the shield of self-defence only when, without sufficient provocation from him, his life was in peril, or his body exposed to grievous injury; that homicide by him cannot be mitigated to the lesser offence of manslaughter, unless the jury are convinced that the killing was unpremeditated, and the result of sudden passion, excited by present injury more grievous than words, we fear that the calendar of bloody crimes is destined to know no diminution in its numbers. The terrors of certain punishment are the only sure means of restraining the evil-minded.

SECTION V.

Degrees of Murder.

Revised Laws of Massachusetts, ch. 207, Sect. 1. Murder committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. The degree of murder shall be found by the jury.

Penal Code of New York, Sects. 183, 184. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either from a deliberate and premeditated design to effect the death of the person killed, or of another; or by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or when perpetrated in committing the crime of arson in the first degree. Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

LEIGHTON *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1882.

[*Reported* 88 *New York*, 117.]

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment entered upon an order made May 20, 1881, which affirmed a judgment of the Court of Oyer and Terminer of the County of New York, entered upon a verdict convicting the plaintiff in error of the crime of murder in the first degree.

The material facts appear in the opinion.[1]

DANFORTH, J. At its close the prisoner's counsel "excepted to all portions of the charge in reference to the question of the time required for premeditation and deliberation." To bring the case within the statutory definition of murder in the first degree it was necessary that the crime should be "perpetrated from the deliberate and premeditated design to effect the death of the person killed." Laws of 1873, chap. 644, § 5. An act co-existent with and inseparable from a sudden impulse, although premeditated, could not be deemed deliberate, as when under sudden and great provocation one instantly, although intentionally, kills another. But the statute is not satisfied unless the intention was deliberated upon. If the impulse is followed by reflection, that is deliberation; hesitation even may imply deliberation; so may threats against another and selection of means with which to perpetrate the deed. If, therefore, the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder.

The charge upon this point was most favorable to the prisoner. After stating the statute (*supra*) the judge said: "There must therefore be, in order to establish the crime of murder in the first degree, deliberation and premeditation; but there is no time prescribed within which these operations of the mind must occur; it is sufficient if their exercise was accomplished when the deed was done resulting in the death." Again he said: "'It is enough if there is time for the mind to think upon, to consider the act of killing, to meditate upon it, to weigh it, and then to determine to do it." Immediately after this follows that portion of the charge to which the learned counsel for the appellant directs our attention. "For example," said the judge, "if I, having from any reason, it matters not what, an enmity toward another, should start from this point and walk to the corner of Chambers Street, weigh in my mind, deliberate upon, and premeditate a deadly assault upon another, and at that corner, meeting there the person toward whom my thoughts were directed, I struck the deadly blow, that would be sufficient deliberation and sufficient premeditation to perfect the crime of murder in the first degree. It is enough that the mind operates in these two respects to accomplish it and to present all the elements that are necessary to establish murder in the first degree."

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[1] Only so much of the case as relates to the degree of the murder is given.

In this there was no error. Then followed a statement of the evidence bearing upon the proposition just laid down. It has been recited in the learned and elaborate opinion of the court below, its correctness has not been denied by the appellant's counsel, and it need not be repeated. It was in our opinion quite enough for submission to the jury.

SECTION VI.

Manslaughter.

LORD MORLY'S CASE.

RESOLUTION OF THE JUDGES. 1666.

[*Reported Kelyng,* 53.]

MEMORANDUM, that upon Saturday the 28th of April, 1666, Ann. 18 Car. 2, all the judges of England, viz., myself, J. K., Lord Chief Justice of the King's Bench; Sir Orl. Bridgman, Lord Chief Justice of the Common Pleas; Sir Matthew Hales, Chief Baron of the Exchequer; my brother Atkins, Brother Twisden, Brother Tyrell, Brother Turner, Brother Browne, Brother Windham, Brother Archer, Brother Rainsford, and Brother Morton, met together at Serjeant's Inn in Fleet Street, to consider of such things as might in point of law fall out in the trial of the Lord Morly, who was on Monday to be tried by his peers for a murder; and we did all *una voce* resolve several things following: —

7.[1] Agreed, that no words, be they what they will, are in law such a provocation as, if a man kill another for words only, will diminish the offence of killing a man from murder to be manslaughter; as suppose one call another son of a whore, or give him the lie, and thereupon he to whom the words are given, kill the other, this is murder. But if upon ill words, both the parties suddenly fight, and one kill the other, this is but manslaughter, for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter; and we were all of opinion that the statute of 1 Jac. for stabbing a man not having first struck, nor having any weapon drawn, was only a declaration of the common law, and made to prevent the inconveniencies of juries, who were apt to believe that to be a provocation to extenuate a murder which in law was not.

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[1] Only the 7th and 8th resolutions are given.

8. Agreed, that if upon words two men grow to anger, and afterwards they suppress that anger, and then fall into other discourses, or have other diversions for such a space of time as in reasonable intendment their heat might be cooled, and some time after they draw one upon another, and fight, and one is killed, this is murder, because being attended with such circumstances as it is reasonably supposed to be a deliberate act, and a premeditated revenge upon the first quarrel; but the circumstances of such an act being matter of fact, the jury are judges of those circumstances.

HUGGETT'S CASE.

Crown Case Reserved. 1666.

[*Reported Kelyng*, 59.]

At a gaol-delivery at Newgate, 25 April, 1666, 18 Car. 2, upon an indictment of murder against Hopkin Huggett, a special verdict was found to this effect: We find that John Berry, and two others with him, the day and place in the inquisition, had *de facto*, but without warrant (for aught appears to us), impressed a man whose name is not yet known, to serve in his Majesty's service in the wars against the Dutch nation; that thereupon, after the unknown man was impressed, he with the said John Berry, went together quietly into Cloth-fair; and the said Hopkin Huggett and three others, walking together in the rounds in Smithfield, and seeing the said Berry and two others with the man impressed, going into Cloth-fair, instantly pursued after them, and overtaking Berry and the impressed man and the two other men, required to see their warrant, and Berry showed them a paper which Hopkin Huggett and the three others said was no warrant; and immediately the said H. Huggett and the three others drew their swords to rescue the said man impressed, and did thrust at the said John Berry; and thereupon the said John Berry and the two others with him did draw their swords and fight together; and thereupon the said H. Huggett did give the wound in the inquisition to the said John Berry, whereof he instantly died; and if upon the whole matter, the said H. Huggett be guilty of murder they find so; if of manslaughter they find so, &c. All the judges of England being met together, at Serjeant's Inn, in Fleet Street, upon other occasions (and before that time having copies of this special verdict sent unto them), after the other business dispatched they were desired to give their opinions in this case, whether they held it to be murder or manslaughter. And the Lord Chief Justice Bridgman, Lord Chief Baron Hales, my brother Atkins, Brother Tyrell, Brother Turner, Brother Browne, Brother Archer, and Brother Rainsford, having had the notes of the special verdict three days before, delivered their opinion as then advised, but they said they would not be bound by it: that this was no murder, but only manslaughter; and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavor any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also, for common humanity sake, as my Lord Bridgman said, to endeavor his rescue; and if in such endeavor of rescue they kill any one, this is no murder, but only manslaughter; and my brother Browne seemed to rely on a case in Coke 12 Rep. p. 87, where divers men were playing at bowls, and two of them fell out and quarrelled, one with another, and a third man who had no quarrel, in revenge of his friend struck the other with a bowl, of which blow he died; this was held to be only manslaughter. But myself, Brother Twisden, Brother Windham, and Brother Morton, were of another opinion; and we held it to be a murder, because there was (as we thought) no provocation at all. And if one man assault another without provocation, and kill him, this is murder; the law in that case implying malice. And we find it was resolved by all the judges in the Lord Morly's case that no words, be they what they will, were such a provocation in law as, if upon them one kills another, would diminish or lessen the offence from being murder to be but manslaughter. As if one calleth another son of a whore, and giveth him the lie, and upon those words the other kill him that gave the words; this, notwithstanding those words, is murder; and we thought those words were apter to provoke a man to kill another than the bare seeing a man to be unduly pressed when the party pressed willingly renders himself. But we held that such a provocation as must take off the killing of a man from murder to be but manslaughter, must be some open violence, or actual striving with, or striking one another; and that answers the case cited by my brother Browne. For there it must be intended that the two men that fell out were actually fighting together; for if there passed only words betwixt these two, and upon them, a third person struck one of them with a bowl, and killed him, we held that to be murder. And to this my Lord Bridgman and the other judges agreed, and we thought the case in question to be much the stronger, because the party himself who was impressed was quiet, and made no resistance, and they who meddled were no friends of his, or acquaintance, but were strangers, and did not so much as desire them which had him in custody to let him go, but presently without more ado, drew their swords at them, and ran at them. And we thought it to be of dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties, and to become patrons to rescue them from wrong; especially in a nation where good laws are for the punishment of all such injuries, and one great end of law is to right men by peaceable means, and to discountenance all endeavors to right themselves, much less other men by force.

Secondly, we four were of opinion that if A. assault B. without any provocation, and draw his sword at him, and run at him; and then B. to defend himself draw his sword, and they fight together. If A. kill B. it is murder, and B. drawing his sword to defend himself shall not lessen the offence of A. from being murder to be manslaughter only; and to this the other judges did (as I take it) agree, for it were unreasonable that if one man draw upon another, and run at him without any provocation that the other man should stand still, and not defend himself, and it is also unreasonable that his endeavor to defend himself should lessen the offence of him who set upon him without provocation.

But we four held that if two men be quarrelling, and actually fighting together, and another man runneth in to aid one of them and kill the other, this is but manslaughter, because there was an actual fighting and striving with violence.

So we held, if such people who are called spirits take up a youth, or other person to carry him away, and thereupon there is a tumult raised, and several persons run in, and there is a man killed in the fray, this is but manslaughter; for there is an open affray, and actual force, which is a sudden provocation, and so that death which ensueth is but manslaughter. But where people are at peace, there, if another man upon suspicion that an injury is done to one of them, will assault and kill him whom he thinketh did the injury, this is murder, so that we hold nothing but an open affray or striving can be a provocation to any person to meddle with an injury done to another, if in that meddling he kill a man, to diminish or lessen the offence from murder to manslaughter.

Memorandum: After this difference I granted a *certiorari* to remove the cause into the King's Bench, to be argued there, and to receive a final and legal determination; and although all the judges of the court were clearly of opinion that it was murder, yet it being in case of life, we did not think it prudent to give him judgment of death, but admitted him to his clergy; and after he read, and was burnt in the hand, we ordered him to lie in prison eleven months without bail, and afterwards until he found sureties to be of the good behavior during his life.[1]

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[1] See on this point the correspondence between Seymour, Q. C., and others and Blackburn, J, printed in note IX. to Stephen's Digest of Cr Law. — Ed.

REGINA *v.* STEDMAN.

OLD BAILEY. 1704.

[*Reported Foster Cr. L.* 292.]

THERE being an affray in the street, one Stedman, a footsoldier, ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled, and Stedman pursuing her stabbed her in the back. Holt was at first of opinion, that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially: but it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.

The smart of the man's wound, and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.

FRAY'S CASE.

OLD BAILEY, CORAM GOULD, J. 1785.

[*Reported* 1 *East P. C.* 236.]

WHERE one, having had his pocket picked, seized the offender, and being encouraged by a concourse of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned, this was ruled to be manslaughter only.

REX *v.* THOMPSON.

CROWN CASE RESERVED. 1825.

[*Reported* 1 *Moody C. C.* 80.]

THE prisoner was tried before Mr. Baron Garrow at the Winter Assizes at Maidstone, in the year 1825, upon an indictment which charged him, first, with maliciously stabbing and cutting Richard

Southerden, with intent to murder; secondly, with intent to disable him; and thirdly, with intent to do him some grievous bodily harm.

On the trial it appeared that the prisoner, who was a journeyman shoemaker, on the 18th of November, 1824, applied to his master for some money, who refused to give it to him till he finished his work; on his subsequently urging for money and his master refusing him, he became abusive, upon which his master threatened to send for a constable. The prisoner refused to finish his work, and said he would go upstairs and pack up his tools, and said no constable should stop him; he came downstairs with his tools, and drew from the sleeve of his coat a naked knife, and said he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own; and then making a twisting or flourishing motion with the knife, put it up his sleeve again, and left the shop.

The master then applied to Southerden, the constable, to take the prisoner into custody; he made no charge, but said "he suspected he had tools of his, and was leaving his work undone;" the constable said he would take him if the master would give him charge of him; they then followed the prisoner to the yard of the Bull's Head Inn; the prisoner was in a public privy there as if he had occasion there. The privy had no door to it. The master said, "That is the man; I give you in charge of him." The constable then said to the prisoner, "My good fellow, your master gives me charge of you; you must go with me." The prisoner, without saying anything, presented a knife to the constable and stabbed him under the left breast; he attempted to make a second, third, and fourth blow, which the constable parried off with his staff. The constable then aimed a blow at his head; the prisoner then ran away with the knife and was afterwards secured.

The surgeon described the wound as being two inches and a half in length and one quarter of an inch deep, and inflicted with a sharp instrument like the knife produced. The knife appeared to have struck against one of the ribs and glanced off. Had the point of the knife insinuated itself between the ribs and entered the cavity of the chest, death would have inevitably been the consequence; if it had struck two inches lower death would have ensued; but the wound, as it happened, was not considered dangerous.

The jury found the prisoner guilty, and sentence of death was passed upon him; but the learned judge respited the execution and submitted the case for the consideration of the judges.

In Hilary term, 1825, all the judges (except Best, L. C. J., and Alexander, L. C. B., who were absent) met and considered this case. The majority of the judges, viz., Abbott, L. C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as the actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only, and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise.

REGINA *v.* WELSH.

CENTRAL CRIMINAL COURT. 1869.

[*Reported* 11 *Cox C. C.* 336.]

THE prisoner was indicted for that he feloniously and with malice aforethought did kill and slay one Abraham.

Pater for the prosecution.

Ribton for the prisoner.

The prisoner had claimed a debt from the deceased, and had summoned him to a police court where the claim was dismissed. The prisoner went from the police office to a public-house, distant about a mile, whither in a short time the deceased also came. "You have got the better of me this time," said the prisoner to him. "Yes," answered the deceased, pleasantly; "I thought I should." "But," said the prisoner, "I 'll have another summons out against you about it." "I am ready," replied the deceased, "to pay what any indifferent person may say is due." "Not you," said the prisoner; "you don't mean to pay anything." The deceased approached him and offered to drink with him. The prisoner refused, saying, "I will not drink with such a man as you." The deceased came near him. The prisoner said, "Don't come near me," and advanced towards him. The deceased retreated several paces. The prisoner came near him. The deceased held out his hand again, until it was within a few inches of the prisoner's face, apparently to ward him off, and saying at the same time, "Words as you like, but keep your hands off." The deceased struck no blow. The prisoner closed with him, and forced him down on a seat, and a few moments afterwards was seen almost upon him, in the act of stabbing him in the abdomen with a clasp knife. The blow was mortal, and the man died.

Ribton, for the prisoner, strove in cross-examination to elicit that there was some blow or push by the deceased.

The principal witnesses, in answer to the learned judge, said that they saw no blow or even push by the deceased; but that, on the contrary, it was the prisoner who shoved or pushed the deceased down.

Ribton, in addressing the jury for the defence, submitted that the question was not whether the provocation was or was not slight (as he admitted it was), but whether or not in point of fact the prisoner was under the influence of ungovernable passion at the time he struck the blow.

KEATING, J., however, said he should tell the jury that the question was, not merely whether there was passion, but whether there was reasonable provocation.

Ribton cited Foster's Crown Law, 295, to show that the law made allowances for human passion, and he urged that upon the evidence there was clearly an assault upon the person by the deceased in holding his hand so near the prisoner's face, and that the probability was that there was a blow, as the witnesses heard the prisoner say "Keep off," and did not see precisely what had happened in the brief interval between that expression and the fatal blow.

Keating, J., in summing up the case to the jury, said: The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say intentionally, without such provocation as would have excused, or such cause as might have justified, the act. Malice aforethought means intention to kill. Whenever one person kills another intentionally, he does it with malice aforethought. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the malice aforethought implied in the intention remains. By the law of England, therefore, all intentional homicide is *prima facie* murder. It rests with the party charged with and proved to have committed it to show, either by evidence adduced for the purpose, or upon the facts as they appear, that the homicide took place under such circumstances as to reduce the crime from murder to manslaughter. Homicide, which would be *prima facie* murder, may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question, therefore, is — first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether it was such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that, if a man commits the crime under the influence of passion, it is mere manslaughter. The law is that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it — the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act. Now, I am bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence. If you can discover it, you can give effect to it; but you are bound not to do so unless satisfied that it was serious. It is urged that there was an assault, and that it is probable there was a blow. That is for you to consider. What I am bound to tell you is that in law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow, — something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act. I endeavored to elicit whether there was anything like a blow by the deceased, but failed to do so. It does not appear that there was anything beyond putting out his hand, which came near the prisoner's face. There is no evidence of his doing anything else; that is the evidence. Upon the evidence it is for you to ascertain whether, taking the law as I have laid it down, you can discover evidence of such a serious provocation as would reduce the crime to manslaughter.

Guilty; sentence, Death.

REGINA v. ROTHWELL.

MANCHESTER ASSIZES. 1871.

[*Reported* 12 *Cox C. C.* 145.]

CHRISTOPHER ROTHWELL was indicted for the wilful murder of his wife, at Oldham, on the 2d of October.

Cottingham for the prosecution.

Torr for the defence.[1]

BLACKBURN, J., in summing up, said: A person who inflicted a dangerous wound, that is to say, a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder; but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance, a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: "Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again." Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did.

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[1] The evidence is omitted.

Guilty of manslaughter; ten years penal servitude.

MAHER *v.* PEOPLE.

SUPREME COURT OF MICHIGAN. 1862.

[*Reported* 10 *Michigan*, 212.]

CHRISTIANCY, J.[1] To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death; without the concurrence of both, the crime cannot exist; and, as every man is presumed innocent of the offence with which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offence, — to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done. It is for the court to define the legal import of the term "malice aforethought," or, in other words, that state or disposition of mind which constitutes it; but the question whether it existed or not, in the particular instance, would, upon principle, seem to be as clearly a question of fact for the jury as any other fact in the cause, and that they must give such weight to the various facts and circumstances accompanying the act, or in any way bearing upon the question, as in their judgment they deserve: and that the court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole or any part of the facts proved, as presumption of law. If courts could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist. I do not here speak of those cases in which the death is caused in the attempt to commit some other offence, or in illegal resistance to public officers, or other classes of cases which may rest upon peculiar grounds of public policy, and which may or may not form an exception; but of ordinary cases, such as this would have been had death ensued. It is not necessary here to enumerate all the elements which enter into the legal definition of malice aforethought. It is sufficient to say that, within the principle of all the recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which ordinary men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; and the act must be prompted by, or the circumstances indicate that it sprung from, a wicked, depraved, or malignant mind, — a mind which even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton, or malignant, reckless of human life, or regardless of social duty.

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[1] Part of the opinion only is given.

But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition, — then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offence as of a less heinous character than murder, and gives it the designation of manslaughter.

To what extent the passions must be aroused and the dominion of reason disturbed to reduce the offence from murder to manslaughter, the cases are by no means agreed; and any rule which should embrace all the cases that have been decided in reference to this point, would come very near obliterating, if it did not entirely obliterate, all distinction between murder and manslaughter in such cases. We must therefore endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned, or overpowered by passion so as to destroy intelligent volition. State *v.* Hill, 1 Dev. & Bat. 491; Haile *v.* State, 1 Swan, 248; Young *v.* State, 11 Humph. 200. Such a degree of mental disturbance would be equivalent to utter insanity, and if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offence, — as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this, and never beyond that degree within which ordinary men have the power, and are therefore morally as well as legally bound, to restrain their passions. It is only on the idea of a violation of this clear duty, that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been in a great measure overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment.

To the question what shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give to a homicide committed under its influence the character of manslaughter, on principle, the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them, — not such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes; for then the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation in every case be held sufficient or reasonable because such a state of excitement has followed from it; for then, by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which, in itself, constitutes an aggravation both in morals and in law.

In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, — unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.

It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter. Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.

The judge, it is true, must, to some extent, assume to decide upon the sufficiency of the alleged provocation when the question arises upon the admission of testimony; and when it is so clear as to admit of no reasonable doubt, upon any theory, that the alleged provocation could not have had any tendency to produce such state of mind in ordinary men, he may properly exclude the evidence; but, if the alleged provocation be such as to admit of any reasonable doubt whether it might not have had such tendency, it is much safer, I think, and more in accordance with principle, to let the evidence go to the jury under the proper instructions. As already intimated, the question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case. That can, with no propriety, be called a rule (or a question) of law which must vary with, and depend upon the almost infinite variety of facts presented by the various cases as they arise. See Stark. on Ev., Amer. ed. 1860, pp. 676 to 680. The law cannot with justice assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances; and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.

The same principles which govern as to the extent to which the passions must be excited and reason disturbed apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. This, like the provocation itself, must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown at all, in mitigation of the offence. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and cannot without gross injustice define the precise time which shall be deemed reasonable, as it has with respect to notice or the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury; and the court cannot take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury. Stark. Ev., ed. of 1860, pp. 768, 769, 774, 775. In Rex *v.* Howard, 6 C. & P., 157, and Rex *v.* Lynch, 5 C. & P. 324, this question of reasonable cooling time was expressly held to be a question of fact for the jury. And see Whart. Cr. L., 4th ed., § 990 and cases cited. I am aware there are many cases in which it has been held a question of law; but I can see no principle on which such a rule can rest. The court should, I think, define to the jury the principles upon which the question is to be decided, and leave them to determine whether the time was reasonable under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear. And in cases of applications for a new trial, depending upon the discretion of the court, the question may very properly be considered by the court.

It remains only to apply these principles to the present case. The proposed evidence, in connection with what had already been given, would have tended strongly to show the commission of adultery by Hunt with the prisoner's wife, within half an hour before the assault; that the prisoner saw them going to the woods together, under circumstances calculated strongly to impress upon his mind the belief of the adulterous purpose; that he followed after them to the woods; that Hunt and the prisoner's wife were, not long after, seen coming from the woods, and that the prisoner followed them, and went in hot pursuit after Hunt to the saloon, and was informed by a friend on the way that they had committed adultery the day before in the woods. I can not resist the conviction that this would have been sufficient evidence of provocation to go to the jury, and from which, when taken in connection with the excitement and "great perspiration" exhibited on entering the saloon, the hasty manner in which he approached and fired the pistol at Hunt, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which, within the principle already explained, would have given to the homicide, had death ensued, the character of manslaughter only. In holding otherwise the court below was doubtless guided by those cases in which courts have arbitrarily assumed to take the question from the jury, and to decide upon the facts or some particular fact of the case, whether a sufficient provocation had been shown, and what was a reasonable time for cooling.

CHAPTER VIII.

LARCENY.

SECTION I.

What Property is the Subject of Larceny.

Bracton De Legibus, 150 b. Larceny is, according to the law, the fraudulent taking of the property of another, with intent to steal, against the will of the owner.[1]

ANONYMOUS.

ASSIZES. 1338.

[*Reported Year Book*, 11 *&* 12 *Ed. III.*, 640.]

A FORESTER was indicted "that he feloniously cut down and carried away trees." The justices would not arraign him, for the felling of trees which are so annexed to the soil cannot be called a felony, even if a stranger had done it. Besides, here perhaps he himself had the keeping of them. But because it was possible that the trees were first of all felled by the lord and then carried away by the forester, they questioned the inquest, who said that he was the forester when he felled and carried them away. SCHARSHULLE [J.], to the inquest: Did the forester conceal the trees from the lord? *The Inquest.* We do not know. ALDEBURGH [J.]. Certainly we do not think it important whether he concealed them or not; but we adjudge that it is no felony, because he was the keeper; and a tree is part of the freehold.[2]

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[1] Furtum est secundum leges contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cuius res illa fuerit.

[2] 12 Lib. Ass., 32, S. C.

REX *v.* WODY.

EXCHEQUER CHAMBER. 1470.

[*Reported Year Book,* 10 *Ed. IV.*, 14, *pl.* 9, 10.]

ONE William Wody was indicted for that he feloniously took and carried away six boxes, with charters and muniments concerning the inheritance of John Culpepper and Nicholas C., etc., contained in the boxes.

Sulyard. It seems that it is not felony, for the sealed boxes shall be called of the same nature as the charters contained in them,[1] while the charters are concerning the inheritance, so that these things touch the inheritance of the realty, etc.

Nele. Every felony ought to be a loss of twelve pence; but in detinue of charters, or of sealed boxes with charters contained in them, those in the Chancery do not say "*ad valentiam*," etc., for they cannot be valued, and so it cannot be felony.

Collow. A man may recover damages in detinue if the charters are burned.

All the justices of the one bench and of the other were assembled in the Exchequer Chamber.

CHOKE, J. It seems that it is not felony for two reasons: first, they are so far real that it cannot be felony. For they are not chattels real, but are real in themselves; for if a man be attainted of felony, the king shall not have his charters concerning his land, for they are real, but he shall have his wardship, or term, for they are chattels real. *Quod fuit concessum per omnes justicios.*

YELVERTON, J., said, that if a man has a franchise to have *catalla felonum*, etc., still he shall not have the charters concerning the land of felons, etc.

MOYLE, J. The lord shall have the charters with the land, etc.

And it was held that if a man gives *omnia bona et catalla sua*, the charters do not pass, therefore they are released, etc.

CHOKE, J. The second reason is because they cannot be valued, etc.; for in detinue for charters one does not say *ad valentiam*, etc., *ut supra*, etc.

LITTLETON, J. The reason why those in the Chancery do not say *ad valentiam* in the writs *ut supra* is only the precedent, etc.; but yet they are of value, for in detinue of charters, if the charters are lost or burned, he shall recover in damages, having regard to the loss that he has by the loss of the charters; this, therefore, proves that they are of value. And though the terms *ad valentiam* and *ad dampnum* are different, yet they are of the same effect. (*Quod fuit negatum,* etc.)

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[1] Upon this argument being urged in Reg. *v.* Powell, 5 Cox C. C. 397, ALDERSON, B., said: "I suppose, then, that if a lion was stole in a cage, it would be said that the cage was *feræ naturæ*." — ED.

And on an indictment for burglary, *sc.* for breaking a house, one should not say *quod fregit domum ad valentiam*, etc.; and, sir, so at common law wilful burning of a house was felony, and yet one should not say *ad valentiam*, etc.

Billing, C. J. Those are felonies of a different nature from robbery, etc.

Littleton, J. Because charters concerning the inheritance are of greater value than other things, therefore it is reason that as great punishment should be inflicted for the taking of them as of other things, etc. And, sir, in trespass *quare pullos espervarios cepit*, one should state the price, but in trespass *quare parcum fregit et damas*, etc., one should not state the price, etc., for it is not the use in the Chancery.

Bingham, J. In your case *quare pullos espervarios in nido*, etc., the plaintiff should state the price, for the property in them is in him; for the nests are the plaintiff's, and so are those which are in the nests, and besides cannot fly out of your possession, etc.

Nedham, J. Felony is only of such thing as the country may have notice of the value of; but here as to charters within the boxes they cannot have notice, etc., of the value of them; wherefore, etc.

Yelverton, J. Felony cannot be of any goods except personal chattels; for a man cannot take my ward feloniously, for it is a chattel real; and it was held that a deer which is domesticated may be stolen, and so when it is dead. And so of fishes taken in a pond, etc.

And then it was advised by them all that this is not felony, wherefore in the King's Bench the defendant was discharged, etc.

ANONYMOUS.

Opinion of the Justices. 1528.

[*Reported Year Book*, 19 *Henry VIII.*, 2, *pl.* 11.]

A question was propounded to all the Justices by the Chancellor. If a man feloniously steals peacocks which are tame and domesticated, whether it is felony or not. And by Fitzherbert and Inglefield [JJ.] it was said that it is not felony, because they are *feræ naturæ* like doves in a dove-cote; and if the young of such doves are stolen, it is not felony. The same law of herons taken out of the nest, or of swans taken, or of a buck, or hind, which are domesticated, or of hares taken out of a garden which is surrounded with a wall, etc. The same law of a mastiff, hound, or spaniel, or of a goshawk which is reclaimed; for they are properly things of pleasure rather than of profit. And so the peacock is a bird more for pleasure than for profit, for often they intentionally destroy all the young except one.

And it was also agreed that apples taken out of the orchard which were growing on the trees at the time of taking, or trees growing upon the [soil?] at the time of taking, or grass cut and carried away, is not felony, and even where they are taken with felonious intent, because these things at the time of taking are parcel of the franktenement; but if my trees are cut down by me, or my grass growing on my land is by me cut and severed, and afterward another with felonious intent steals it, that is felony.

FITZJAMES [C. J.] and the other justices said that peacocks are commonly of the same nature as hens or capons, geese or ducks, and the owner has property in them, and they have *animum revertendi*, and they are not fowls of warren, like pheasant, partridge, conies, or animals of that sort, for the taking of these with felonious intent is not felony.

And in the end it was agreed by all the justices, that this taking of peacocks was felony for the cause aforesaid, *Quod Nota.*

REX *v.* SEARING.

CROWN CASE RESERVED. 1818.

[*Reported Russell & Ryan,* 350.]

THE prisoner was tried before Mr. Baron Wood at the Lent Assizes for Hertfordshire in the year 1818 for larceny in stealing "five live tame ferrets confined in a certain hutch," of the price of fifteen shillings, the property of Daniel Flower.

The jury found the prisoner guilty; but on the authority of 2 East, P. C. 614, where it is said that ferrets (among other things) are considered of so base a nature that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be taken thereon.

It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for nine shillings.

In Easter term, 1818, the judges met and considered this case; they were of opinion that ferrets (though tame and salable) could not be the subject of larceny and that judgment ought to be arrested.

REGINA *v.* CHEAFOR.

CROWN CASE RESERVED. 1851.

[*Reported* 5 *Cox C. C.* 367.]

AT the Quarter Sessions for the county of Nottingham, held at East Retford, on the 7th of July, 1851, the prisoner was indicted for feloniously stealing four tame pigeons, the property of John Mansell. The pigeons, at the time they were taken by the prisoner, were in the prosecutor's dove-cote, over a stable on his premises, being an ordinary dove-cote, and having holes at the top for the ingress and the egress of the pigeons, and having a door in the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, breaking open the door and taking away the pigeons. The prisoner's counsel contended that the pigeons being at liberty at any time to go in and out of the dove-cote, and therefore not reclaimed and in a state of confinement, were not the subjects of larceny. The chairman directed the jury that, in his opinion, the view contended for by the prisoner's counsel was correct, and that the pigeons were not properly the subjects of larceny. The jury found the prisoner guilty of larceny; but judgment was postponed to ask the opinion of this court whether the learned chairman's direction to the jury was right, and whether the prisoner, under the facts stated, was properly convicted.

The case was not argued by counsel.

LORD CAMPBELL, C. J., delivered the judgment of the court. After reading the case, his Lordship said that they thought the direction of the chairman was clearly wrong. Pigeons must, from the nature of them, have free egress to the open air: and the question therefore was, whether there could be a larceny of tame pigeons. If not, neither could there be larceny of chickens, ducks, or any poultry. Whether they were tame or not was a question for the jury. Luke's case (Rosc. Cr. Ev. 577) is said by Mr. Greaves[1] to have been determined on the ground that the pigeons were reclaimed, not that they were shut up in boxes. It had been mistakenly supposed that Baron Parke had decided that pigeons were not the subjects of larceny unless strictly confined; there is no question that they are, even though they are allowed the liberty of going to enjoy the air when they please.

Conviction affirmed.

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[1] The passage referred to is in 2 Russ. on Crimes, p. 83, as follows: "Where pigeons were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny." Upon which, in Mr. Greaves' edition, there is the following note: "Luke's case, Rosc. Cr. Evid. 577, and, *ex relatione*, Mr. Granger. The case was determined on the ground that the pigeons were reclaimed; and not on the ground that they were shut up in their boxes at the time they were taken." — REP.

REGINA *v.* WATTS.

CROWN CASE RESERVED. 1854.

[*Reported* 6 *Cox C. C.* 304.]

THE prisoner, William Mote Watts, was indicted at the Quarter Sessions for the North Riding of Yorkshire, on the 2d of June, 1853, for stealing on the 3d day of May, 1853, a piece of paper, the property of the prosecutor, Francis Patteson, and was convicted. The piece of paper found to have been stolen had written upon it when taken by the prisoner, as alleged in the indictment, an agreement between the prosecutor and the prisoner, signed by each of them. The agreement could not be produced, but secondary evidence of it was received, from which it appeared that the prisoner contracted thereby to build two cottages for the prosecutor, for a sum specified, according to certain plans and specifications, and the latter agreed to pay two instalments, being part of the price agreed on, at certain stages of the works, and the remainder on completion; and it was stipulated that any alterations that might take place during the progress of the building should not affect the contract, but should be decided upon by the employer and employed, previous to such alterations taking place. Under this instrument the work was commenced and continued. At the time when it was stolen by the prisoner, as alleged, the work was going on under it; nevertheless it was proved at the trial that when the agreement was stolen the prisoner had been paid all the money which he was entitled to under it, although there was money owing to him for extras and alterations. The agreement was unstamped. The counsel for the prisoner objected at the close of the case for the prosecution, that from the evidence it was clear that at the time the piece of paper referred to in the indictment was taken by the prisoner, it was, in reality, a subsisting and valid agreement, and therefore not the subject of larceny (as a piece of paper only) at common law. The question for the opinion of the court is, whether, under the circumstances above stated, the prisoner could be lawfully convicted of feloniously stealing a piece of paper, as charged in the indictment. No judgment was passed on the prisoner, and he was discharged on recognizance of bail to appear and receive judgment when required.

This case was before the court on the 12th November, 1853, and was sent back to be restated, and an alteration was made in it to the effect that the agreement was one which required a stamp.[1]

LORD CAMPBELL. C. J. I am of opinion that this conviction is wrong. I think that the prisoner could not, under the circumstances stated, be indicted for stealing a piece of paper. If the agreement had been stamped, it seems to be allowed, notwithstanding the ingenious argument of Mr. Price, that an indictment for stealing a piece of paper could not be supported; because then it would be what is commonly called a chose in action, and by the common law larceny cannot be committed of a chose in action. Strictly speaking, the instrument of course is not a chose in action, but evidence of it, and the reason of the common-law rule seems to be that stealing the evidence of the right does not interfere with the right itself; *jus non in tabulis;* the evidence may be taken but the right still remains. At all events, whatever be the reason of the rule, the common law is clear that for a chose in action larceny cannot be supported; and the legislature has repeatedly recognized that rule by making special provision with regard to instruments which are choses in action, and of which but for those enactments larceny could not be committed. As to this not being a chose in action, because all that was due had been paid upon it, it appears that the agreement is still executory, and might be used by either side to prove their rights. Then comes the objection as to its not being stamped; but though it is not stamped, I am of opinion that it is an agreement. There is a very clear distinction between instruments which without a stamp are wholly void, and those which may be rendered available at any moment by having a stamp impressed upon them. There are many cases in which an unstamped agreement is considered evidence of a right. When the question arises at Nisi Prius, as soon as it appears that the agreement was reduced into writing, parole evidence is excluded, because the written instrument is the proper and only evidence; and Bradley *v.* Bardsley (14 M. & W. 873) is strong to show that the court considers an unstamped agreement evidence of a right. To an action on an agreement a plea that it was not stamped is clearly bad, for the agreement may be stamped even pending the trial, and may then be given in evidence, as the stamping reflects back to the period of the making of the instrument. I agree that we must look at the state of the instrument at the time of the larceny committed; but it then had a potentiality of being rendered available, and it was evidence of an agreement; it was therefore evidence of a chose in action. and not the subject of larceny.

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[1] The arguments are omitted.

PARKE, B. I am of opinion that the conviction is right. There is no doubt that at common law larceny cannot be committed of any instrument which is the evidence of a chose in action; but I think that when this instrument was stolen it was not evidence of a chose in action. Being unstamped, it was not available either in law or in equity, and by the operation of the Stamp Act could not be used for the purpose of showing a right. It was a piece of paper, and I differ from Lord Campbell in thinking that the potentiality of converting a chattel into evidence of a chose of action is sufficient to prevent it from being the subject of larceny. Like the parchment on which a deed is written, and which is nothing but a piece of parchment until the instrument is perfected, this in its imperfect state was no evidence of an agreement, but was a piece of paper only. Where a plaintiff is prevented from giving parole evidence of a written agreement, it is because he had the power of giving better evidence of it by getting the instrument stamped, and if he does not get it stamped, it is his own fault. If the instrument is lost and he cannot get it stamped, then still parole evidence of it is inadmissible. In the present case therefore, I think that that which was stolen was merely a piece of paper capable of being converted, but not yet actually converted into a valid agreement, or the evidence of an agreement, and it is solely as evidence of an agreement that the common law would prevent it from being the subject of larceny.

ALDERSON, B. I agree with Lord Campbell that this was an agreement at the time it was stolen. If the writing only becomes an agreement at the time when it is stamped, how is it that you may declare upon an unstamped agreement? If the agreement only dates from the stamping, the cause of action does not arise until the time of stamping, and, therefore, subsequently to the declaration. This seems to prove that the thing has existence as an agreement, though without a stamp it is not admissible in evidence. The reason why title-deeds and choses in action are not the subject of larceny, is because the parchment is evidence of the title to land, and the written paper is evidence of a right; and, though the instrument is stolen, the right remains the same. It has, however, no existence in point of law, as a piece of paper or parchment merely, but is to be considered as part of the right or title; and the extent to which this is carried appears from the passage in Lord Coke (3 Inst. 109), in which even the box containing the charters is treated as part of the title also. The paper becomes evidence of a right, and ceases to have any existence as anything else.

COLERIDGE, J. I am of the same opinion with Lord Campbell and my brother Alderson. It is admitted that if this agreement had been stamped, it would not have supported a charge of stealing a piece of paper, a higher character having been given it, and its character as a piece of paper having been thereby absorbed; and, though unstamped, I think that is still the case. If the objection was taken at Nisi Prius, the judge would look at the paper to see what its character was; it would then appear to have written on it an agreement; and, but for the Stamp Act, it would be the evidence and the only evidence of the agreement; and even, though rendered inadmissible by that Act, it has the effect of excluding all parole evidence of that contract. It is true that it is not in a condition in which it can be effectually sued upon; but it is capable of being rendered complete as evidence, by being stamped; and it would not acquire any new character by the stamping; it would still be the same evidence of a chose in action, rendered admissible in evidence by reason of the stamp. As soon as the instrument is signed it becomes an agreement, and it is only because the stamp laws interfere that it is prevented from being used in evidence. The point is extremely subtle; and one regrets that the fate of parties in a court of justice should depend upon distinctions so nice; but upon the best consideration which I can give to the case, it seems to me that the conviction is wrong.

Maule, J. I am of the same opinion. I think, indeed everybody thinks, that this is an unstamped agreement; and if it is an agreement, it is not the subject of larceny. When one speaks of a piece of paper as being an agreement, it means that the paper is evidence of the right; and as a right cannot be the subject of larceny, neither is the paper which is evidence of it.

Wightman, J., and Cresswell, J., concurred.

Platt, B. I, also, am of the same opinion. If an action were brought upon this instrument, the declaration and all the pleadings would describe it as an agreement; and it becomes so, in my opinion, as soon as it is signed by both parties, though not available in evidence without the impression of a stamp. The mode of taking the objection at Nisi Prius proves the same thing. The witness is asked whether the agreement was not in writing; and when he answers "yes," and the instrument is produced, the judge looks at it, and finding it to be an agreement (because upon no other ground could he do so), rejects it for want of a stamp. It would surely be strange to hold that it was no agreement until it was stamped, when the necessity for a stamp arises from its being an agreement. According to that argument, if the instrument is stamped the prisoner must be acquitted; but if not stamped, convicted. But it seems to me that that would be to bring a man within the reach of the criminal law by a side wind, and a degree of subtlety consistent neither with law or justice.

Williams, J., and Martin, B., concurred.

Crompton, J. I think there is sufficient proof that this was a subsisting agreement; and it wants stamping because it is an agreement.

Conviction reversed.

REGINA *v.* SHICKLE.

Crown Case Reserved. 1868.

[*Reported L. R.* 1 *C. C. R.* 158; 11 *Cox C. C.* 189.]

The following case was stated by Cockburn, C. J.: —

James Shickle was tried before me at the last assizes for the County of Suffolk on an indictment for larceny for stealing eleven tame partridges.

There was no doubt that the prisoner had taken the birds *animo furandi*, but a question arose whether the birds in question could be the subject of larceny; and the prisoner having been convicted, I reserved the point for the consideration of the court.

The birds in question had been reared from eggs which had been taken from the nest of a hen partridge, and which had been placed under a common hen. They were about three weeks old, and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out, as the brood of a hen so confined are wont to do. The coop had however been removed and the hen set at liberty, but the young birds still remained about the place with the hen as her brood and slept under her wings at night.

It is well known that birds of a wild nature, reared under a common hen, when in the course of nature they no longer require the protection and assistance of the hen and leave her, betake themselves to the woods or fields, and after a short time differ in no respect from birds reared under a wild hen of their own species.

The birds in question were neither tame by nature nor reclaimed. If they could be said to be tame at all it was only that their instinct led them during their age of helplessness to remain with the hen. On their attachment to the hen ceasing, the wild instincts of their nature would return and would lead them to escape from the dominion and neighborhood of man. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The question is whether, under the circumstances, there can be such property in birds of this description as can be the subject-matter of larceny.

Douglas, for the prisoner. These birds are *feræ naturæ*, and unless reclaimed are not the subject of larceny. The case finds that they were not tame nor reclaimed; that they were restrained by their instinct only from betaking themselves to the woods or fields, not being confined in any way. They could not therefore be the subject of larceny.

No counsel appeared for the Crown.

Bovill, C. J. I am of opinion that upon the facts stated, the question asked of us must be answered in the affirmative, and that the conviction is right. The case states that "from their inability to escape they were practically in the power and dominion of the prosecutor." That is sufficient to decide the point. In Regina *v.* Cory, 10 Cox C. C. 23, the law on the subject is very clearly laid down by my brother Channell. He there says, speaking of pheasants, hatched under circumstances similar to those here: "These pheasants, having been hatched by hens and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case, but only the question of identity." In that statement of the law we all concur. The question here is, Were these birds the subject of property? They were so when first hatched, and they remained so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner. The prisoner therefore was rightly convicted.

Channell, B., concurred.

Byles, J. I am of the same opinion. The usual cases of larceny of animals are those of animals which being at first wild have become tame and reclaimed. In this case the only difference is that the birds here are tame and have been so from their birth, though they may become wild at a future time.

Blackburn and **Lush**, JJ., concurred.

Conviction affirmed.[1]

STATE *v.* TAYLOR.

Supreme Court of New Jersey. 1858.

[*Reported* 3 *Dutcher*, 117.]

Green, C. J.[2] The indictment charges the defendant with stealing "eighteen bushels of oysters, of the value of eighteen dollars, of the goods and chattels of one George Hildreth." It is objected that oysters being animals *feræ naturæ*, there can be no property in them, unless they be dead or reclaimed, or tamed, or in the actual power or possession of the claimant; and that the want of such averment is a fatal defect in the indictment. 2 Bla. Com. 390, 392; Arch. C. P. 116; 3 Chitty's Cr. L., 947; Wharton's C. L. §§ 1754–55.

The principle, as applied to animals *feræ naturæ*, is not questioned. But oysters, though usually included in that description of animals, do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his house or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed and made tame by art, industry, or education; nor to be confined, in order to be within the immediate power of the owner. If at liberty, they have neither the inclination nor the power to escape. For the purposes of the present inquiry, they are obviously more nearly assimilated to tame animals than to wild ones, and, perhaps, more nearly to inanimate objects than to animals of either description. The indictment could not aver that the oysters were dead, for they would then be of no value; nor that they were reclaimed or tamed, for in this sense they were never wild, and were not capable of domestication; nor that they were confined, for that would be absurd. The only averment that could be made is, that they had been gathered, or were in the actual possession of the prosecutor, which certainly is not necessary in order to sustain the indictment. Under our laws there may be property in oysters growing naturally upon the land of another person, and which the owner may have acquired by purchase. In regard to these, it would not be averred that they had ever been gathered or been under the control of the owner or in his possession, actual or constructive, further than inanimate objects are in the possession of the owner, upon the principle that property in personal chattels draws after it the possession. The indictment is not defective.

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[1] See also Regina *v.* Head, 1 F. & F. 350.

[2] The opinion only is given; it sufficiently states the case. Part of the opinion, not involving any question of larceny, is omitted.

The more material question in the cause is whether, upon the case stated, the oysters in question were the subject of larceny. Was the law upon this point correctly stated in the charge to the jury? The jury were instructed that if the same oysters which were planted by Hildreth were unlawfully taken by the defendant, with the intent to steal them: if the oysters so planted could be easily distinguished from other oysters that grew in the sound; if they were planted in a place where oysters did not naturally grow; if the place where they were planted was marked and identified, so that the defendant and others going into the sound for clams and oysters naturally growing there could readily know that these oysters were planted and held as private property, and were not natural oysters, or in or upon a natural oyster bed, then the oysters were the subject of larceny, and the defendant might be convicted. But if the jury believed that the oysters were planted in or upon a natural bed, they should be considered as abandoned to the public, and not the property of Hildreth; or, if the jury believed that the planted oysters were not marked and identified, as before stated, the defendant should be acquitted.

There is clearly nothing in the charge that conflicts with the well-settled law of the State, as decided in Arnold *v.* Mundy, 1 Halst. 1, namely, that arms of the sea, including both the waters and the land under the waters, for the purposes of navigation, fishing, and all other uses of the water and its products are common to all the people of the State. Nor is there anything in the charge in conflict with the principles which appear to have been adopted by the court in the earlier case of Shepard and Layton *v.* Leverson, Penn. 391. The facts in evidence clearly distinguish the present case from that of Shepard and Layton *v.* Leverson. In that case it was not shown that the oysters taken by the defendant were the identical oysters planted by the plaintiff; nor was there any mode by which the oysters of the plaintiff could be identified. Neither of those difficulties exists in the present case.

The oysters in question had once been the property of Hildreth. The only question is, whether the planting of these oysters in a public sound, where all the inhabitants have a common right of fishery, was necessarily an *abandonment*, or a return of the property to the common stock. There was clearly no intention on the part of the owner to abandon his property; on the contrary, they were gathered and planted expressly for the benefit of the owner. If an abandonment is to be presumed, it will be a legal intendment directly against the truth of the case. The casting of property into the sea, with the intention of reclaiming it, is not an abandonment. "He," says Domat, "who finds a thing that is abandoned, that is, of which he who was master of it, *quits and relinquishes the possession and property, not being willing to keep it any longer*, becomes master of it." Domat's Civ. L., part 1, b. 3, title 7, §§ 2, 9 (Am. ed. 1850, § 2154); 2 Bla. Com. 9, 402.

It was held by the Chief Justice, in the case of Shepard and Layton *v.* Leverson, that the mere act of throwing the oysters into a public river, where all the inhabitants have a common right of fishery, was of itself an abandonment in law, on the ground that, where the subject is put without the power of the owner, where it is thrown into the common stock, from which it cannot be distinguished, there can be no question of intent. It was held analogous to the case of a deer taken in a forest, and turned loose again. But it was admitted that where the act relied on as an abandonment is in itself equivocal, and where the identical property may be known and resumed at pleasure, then the intention may be made a question. Now this case finds that the oysters in question could readily be identified; that no oysters grew naturally where they were planted, and that the spot where they were planted was designated. The subject of the property, having itself no power of locomotion, and being planted where no other oysters naturally grew, it was not (as in the case of the deer in a forest) put without the power of the owner, nor thrown into the common stock, from which it could not be distinguished.

In Fleet *v.* Hegeman, 14 Wend. 42, it was held by the Supreme Court of New York that oysters planted by an individual in a bed clearly designated in a bay or arm of the sea, which is a common fishery, are the property of him who planted them, and that, for taking them away by another, trespass lies. This case was approved in Decker *v.* Fisher, 4 Barb. 592, and its authority recognized in the more recent case of Brinckerhoff *v.* Starkins, 11 Barb. 248; Angell on Tide Waters, 139. These authorities clearly sustain the instruction given to the jury in the present case.

COMMONWEALTH *v.* SHAW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[*Reported* 4 *Allen*, 308.]

INDICTMENT for larceny of several hundred "cubic feet of illuminating gas, each cubic foot being of the value of three mills, of the property, goods, and chattels of the Boston Gas Light Company."

At the trial in the Superior Court, before WILKINSON, J., it appeared that the defendant occupied a house in Ashland Street in the city of Boston, and that a service pipe of the Boston Gas Light Company led from their main pipe in that street to within a short distance of a gas meter owned by them and placed under the front steps outside of the wall of the house, but upon the premises occupied by her, and the defendant made the usual connection from the service pipe with the inside supply pipe by short pieces of lead pipe belonging to her, through which the company had supplied her with gas; but, upon non-payment of the gas rates, the company removed the meter and shut off the gas by closing a stopcock in the service pipe, upon the premises occupied by her, and gave her notice thereof; after which she, without the consent or knowledge of the company, and to avoid paying for the gas, made a connection by means of lead pipe between the service pipe and the pipe inside of the house, and turned the cock in the service pipe, and received and consumed gas belonging to the company. There was no question that the company was legally incorporated.

The defendant requested the court to instruct the jury that no conviction could be had under this evidence; but the judge instructed the jury that, if they were satisfied that the defendant took the gas with a felonious intent, she was guilty of larceny. The jury returned a verdict of guilty, and the defendant alleged exceptions to this ruling, as well as to an order of the judge overruling a motion in arrest of judgment on the ground that the indictment was insufficient in law.

J. F. Pickering, for the defendant.

G. P. Sanger (district attorney), for the Commonwealth.

BIGELOW, C. J. We cannot doubt that the instructions given to the jury in this case were right. There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity, and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes, which belonged to them, and that the defendant severed a portion of that which was in a pipe of the company by taking it into her house and there consuming it. All this, being proved to have been done by her secretly, and with an intent to deprive the company of their property, and to appropriate it to her own use, clearly constituted the crime of larceny.

It was suggested by the counsel for the defendant that, if she was guilty of any offence, it was not larceny, but embezzlement, inasmuch as it appeared that the gas was intrusted to her possession by the company, and that at the time of the alleged felonious taking she was the bailee thereof. But the facts proved entirely negative the existence of any such relation between her and the company. The gas was not in her possession. On the contrary, the pipe had been severed from the meter by closing a stopcock in the service pipe, which belonged to the company, for the very purpose of preventing her obtaining possession of it. The fact that the end of the pipe was on the premises occupied by her is wholly immaterial. It was not placed there to be in her custody or control, and she had no possession of it or its contents. The facts proved at the trial are similar to those which were shown to exist in the case of Regina *v.* White, 6 Cox C. C. 213, in which a conviction of the defendant for the larceny of gas was affirmed by the court of criminal appeal. That case, however, was not so strong against the defendant as the present one, because it there appeared that the owners of the gas had not caused it to be shut off from the premises of the defendant, to prevent him from making use of it.

As it is admitted that the acts charged on the defendant were committed prior to the time when St. 1861, c. 168, took effect, its provisions can in no way affect the present case.[1]

Exceptions overruled.

MULLALY *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1881.

[*Reported* 86 *New York*, 365.]

ERROR to the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 20, 1881, which affirmed a judgment of the Court of General Sessions in and for the county of New York, entered upon a verdict convicting the plaintiff in error of the crime of petit larceny in stealing a dog.[2]

EARL, J. The prisoner was convicted of stealing a dog of less value than $25. His counsel contended at the trial and has argued before us that stealing a dog is not larceny, and whether it is or not is the sole question for our present determination.

The learned opinion pronounced at the general term leaves but little to be written now. At common law the crime of larceny could not be committed by feloniously taking and carrying away a dog. Wharton's

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[1] See Ferens *v.* O'Brien, 11 Q. B. D. 21 (larceny of water). — ED.

[2] Arguments of counsel are omitted.

Cr. Law (4th ed.), § 1755; 4 Black. Com. 235; 1 Hale's Pleas of the Crown, 510; Coke's Third Inst. 109. And yet dogs were so far regarded as property that an action of trover could be brought for their conversion, and they would pass as assets to the executor or administrator of a deceased owner. Bacon's Abr., Trover, D.; 1 Wms. on Ex'rs (6th Am. ed.), 775.

The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature, and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange, and thus probably changed the current of modern history (2 Motley's Dutch Republic, 398), and the faithful St. Bernards, which after a storm has swept over the crests and sides of the Alps start out in search of lost travellers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent.

In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

This common-law rule was extremely technical, and can scarcely be said to have had a sound basis to rest on. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke, in his Institutes, cited above, said: "Of some things that be *feræ naturæ*, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons to make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed."

In the reign of William I. it was made grand larceny to steal a chattel valued at twelve pence or upwards, and grand larceny was punishable by death, and one reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that "a person should die for them;" and yet those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk or falcon.

The artificial reasoning upon which these rules were based is wholly inapplicable to modern society. *Tempora mutantur et leges mutantur in illis.* Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.

If the common-law rule referred to ever prevailed in this State, we have no doubt it has been changed by legislation. It is provided in 2 R. S. 690, § 1, that every person who shall be convicted of stealing "the personal property" of another, of the value of $25 or under, shall be adjudged guilty of petit larceny; and then, on page 703, § 33, "personal property," as used in that chapter, is defined to mean "goods, chattels, effects, evidences of rights of action," and certain written instruments. This definition of personal property is certainly comprehensive enough to include dogs. We think it was intended to be taken literally, and that the law-makers meant to make it the crime of larceny to steal any chattel which had value and was recognized by the law as property. In a note to § 33 (3 R. S. 837), the revisers say that "this broad and comprehensive definition is given to prevent the enumeration of each particular instrument or article that may be the subject of larceny, robbery, embezzlement, or obtaining property under false pretences. The ancient idea that rights in action were not subjects of larceny has been gradually yielding to the extension of commerce, the increase of business, and the necessities of mankind, until at last we have begun to believe that anything which can be stolen, and which is of value to the owner, should be protected by the law." At the same time a system for the taxation of dogs was enacted (1 R. S. 704), and it can scarcely be supposed that the legislature meant to regard dogs as property for the purpose of taxation and yet leave them without protection against thieves.

The definition of personal property found in the statute is not to be referred to the common law, but to the common understanding of the time when the statute was enacted.

In view, therefore, of all the circumstances to which we have alluded, and for all the reasons stated, we are of opinion that the law-makers intended, by the legislation contained in the Revised Statutes, to change the common-law rule as to stealing dogs, if it was before recognized as having force in this State; and to this effect are the only judicial decisions upon this subject which have been rendered in this State, so far as they have come to our knowledge. People *v.* Maloney, 1 Park. Cr. 593; People *v.* Campbell, 4 id. 386; see, also, People *ex rel.* Longwell *v.* McMaster, 10 Abb. (N. S.) 132.

Our attention has been called by the counsel for the prisoner to certain decisions in other States, which tend to sustain his contention. Findlay *v.* Bear, 8 Serg. & Rawle, 571; State of Ohio *v.* Lymus, 26 Ohio St. 400; State *v.* Holder, 81 N. C. 527; Ward *v.* State, 48 Ala. 161. But so far as those cases announce views in conflict with those above expressed, we are not disposed to follow them.

We conclude, therefore, that the conviction was right, and should be affirmed.

All concur, except FOLGER, C. J., dissenting, holding that the common law does not recognize a dog as the subject of larceny, and that the Revised Statutes, in its definition of the subjects of larceny, do not include that animal. *Judgment affirmed.*[1]

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[1] *Acc.* Haywood *v.* State, 41 Ark. 479. See Hurley *v.* State, 30 Tex. App. 333. — ED.

REGINA *v.* MORRISON.

CROWN CASE RESERVED. 1859.

[*Reported Bell C. C.* 158.]

CROMPTON, J. We are of opinion that this conviction is right, and ought to be affirmed. The question is whether a pawnbroker's ticket, in the usual form, is the subject of larceny, and is properly described either as a warrant for the delivery of goods, a pawnbroker's ticket, or a piece of paper. We think that the instrument in question is a "warrant for the delivery of goods" within the meaning of the 7 & 8 Geo. 4, c. 29, s. 5, and that the stealing of such a document is an offence subjecting the offender to the same punishment as if he had stolen chattels of the like value as the value of the goods mentioned in the document. . . .[1] But, supposing such a ticket not to be a warrant for the delivery of goods within the provisions of that statute, we are of opinion, on the other point in the case, that the conviction was right as for stealing a pawnbroker's ticket or piece of paper. It clearly is so unless it fall within the rule of the common law by which certain documents of title, and certain documents concerning mere choses in action, were not the subjects of larceny. We are not at liberty to infringe a rule so long settled, and which has been acted upon until the present time, but we should be very reluctant to extend such a rule, and we ought to be careful not to apply it to cases to which the authorities do not clearly shew it to be applicable. The state of the law in this respect was well remarked upon a hundred years ago by counsel — Strange, 1135, Rex *v.* Westbeer. He says, "If I steal a skin of parchment worth a shilling, it is a felony, but when it has 10,000*l.* added to its value by what is written upon it, it is no offence to take it away;" and he proceeds to say, "The use to be made of this observation is, that so far as the law is settled, it is not to be altered; but if it does not exempt this particular case, there is no reason to exclude it;" and in this remark we fully concur. Documents of title to real property are not the subject of larceny, but we find no rule extending such doctrine to documents and tokens shewing a right to personal property; and the way in which the rule is enunciated as to real property seems to shew that it does not apply to documents relating to personalty Again, if it is a document relating to, or concerning a mere chose in action, as a bond, bill, or note, that is, as I understand it, a matter resting in contract, and giving a right by way of contract only, it is not the subject of larceny. In the Queen *v.* Watts, Dears. C. C. R. 326, Alderson, B., asks, "Is not the reason why a chose in action is not the subject of larceny this, because it is evidence of a right, and that you cannot steal a man's right"? And MAULE, J., page 335, observes:

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[1] The discussion on this point is omitted. — ED.

"When one speaks of a piece of paper as being an agreement, it means that the paper is evidence of a right, and, as a right cannot be the subject of larceny, neither is the paper, which is evidence of it." Where, however, the thing represented by the paper is not a mere right of contract or chose in action, but is a personal chattel, to the property and right of possession of which the party has a right to treat himself as entitled, the rule does not seem to apply. The thing to which the document has reference is personal property which may be stolen; and the words in which the rule is ennnciated appear to us to treat such documents as not within the exception. The rule will be found laid down in the same, or nearly the same, words from the earliest time; see Roscoe's Criminal Law, by Power, 612, and the authorities there cited. This rule is stated to be "that bonds, bills, and notes, which concern mere choses in action, were held at common law not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property in possession of the party from whom they are taken." This clearly excludes from the rule documents of title importing property in possession of the party, and, remembering the former part of the rule, as to documents of title, so carefully confined to realty, we think that such documents of title to personalty cannot be considered within the rule. If it is a mere agreement to deliver property, not the party's own, or not specific, it would, we think, be within the rule. It would rest in agreement, would confer a right of action only, and would be in every respect a chose in action. But we look at the pawnbroker's ticket as importing a property in possession. We had some doubt at first whether the party could be said to have the right to the property in possession according to the meaning of the rule; but it is quite clear that the possession of the bailee, or pawnee, is the possession of the bailor or pawnor for the purpose of an indictment, and he has a right to lay the goods pawned or bailed as his goods, that is, as goods his property and in his possession: goods pawned, and the like, may be laid to be the goods and chattels of the person to whom they are so entrusted, or of the owner, at the option of the prosecutors; see Jervis Archbold, by Welsby, 14th edition, 34, where the authorities on this subject are collected. We think, therefore, that we should be extending the rule further than we are warranted by any authority in doing if we were to hold that it extended further than to cases where the document concerns choses in action merely, and is only an agreement to deliver personal property, not the party's own; and we think that in the present case the document relates to personal property to which the party is entitled, and that he is not the less entitled to the possession because there is a lien, which there is in so many cases of bailment, where such lien does not interfere with the right of property or possession as far as concerns indictments. It should be observed that this construction by no means makes the provisions of the 7 & 8 Geo. 4 useless, as that statute has the effect of making the stealing, which might otherwise be the stealing of a chattel of extremely small value, a stealing of a chattel of the like value as the value of the goods mentioned in the document; and as there may be cases of orders for the delivery of goods which import no property in any specific goods, and where the rights of the holder may only depend on a contract to deliver some goods, so that the document is in effect the evidence of a mere chose in action, and would not be the subject of larceny if not within the provisions of the statute. We should add that it would be very difficult to hold the present ticket not to be the subject of larceny without overruling the case of Regina *v.* Boulton, 1 Den. C. C. R. 508, a decision in this court binding upon us. It was there held that a railway ticket in the usual form was a chattel, and the subject of an indictment for obtaining goods under false pretences. That, like the ticket in the present case, was in the nature of a token, and it evidenced the right of being carried on the railway without further charge, and it was more in the nature of a mere agreement and of a document concerning a mere chose in action than the present, where it imported a right to personal property. The court held it, however, to be a chattel, valuable as conferring the privilege of travelling without further payment. If the ticket in the present case be the subject of larceny, and not within the exception referred to, the description of a "pawnbroker's ticket," or of a " piece of paper," is clearly sufficient. For these reasons we think that the conviction is right, and that it ought to be affirmed. *Conviction Affirmed.*

SECTION II.

Possession.

(*a*) THE ACT OF ASSUMING POSSESSION.

REX *v.* WALSH.

CROWN CASE RESERVED. 1824.

[*Reported* 1 *Moody C. C.* 14.]

THE prisoner was tried before Thomas Denman, Esquire, Common Serjeant, at the Old Bailey Sessions, January, 1824, on an indictment for stealing a leathern bag containing small parcels, the property of William Ray, the guard to the Exeter mail.

At the trial it appeared that the bag was placed in the front boot, and the prisoner, sitting on the box, took hold of the upper end of the bag, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel on the pavement, and both had hold of it together, endeavoring to pull it out of the boot, with a common intent to steal it. Before they were able to obtain complete possession of the bag, and while they were so engaged in trying to draw it out, they were interrupted by the guard and dropped the bag.

The prisoner was found guilty, but the facts above stated were specially found by the jury, in answer to questions put to them by the Common Serjeant.

The Common Serjeant entertaining some doubts whether the prisoner could be truly said to have "stolen, taken, and carried away" the bag, he respited the judgment, in order that the opinion of the judges might be taken on the case.

In Easter term, 1824, the judges met and considered this case. They held the conviction right, being of opinion that there was a complete *asportation* of the bag.[1]

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[1] *Acc.* Rex *v.* Lapier, 2 East P. C. 557; Harrison *v.* People, 50 N. Y. 518; State *v.* Jones, 65 N. C. 395; State *v.* Craige, 89 N. C. 475; Eckels *v.* State, 20 Ohio St. 508; State *v.* Chambers, 22 W. Va. 779. — ED.

REGINA *v.* WHITE.

CROWN CASE RESERVED. 1853.

[*Reported* 6 *Cox C. C.* 213; *Dearsley C. C.* 203.]

THE prisoner was indicted at the last Quarter Sessions for Berwick-upon-Tweed for stealing 5000 cubic feet of carburetted hydrogen gas of the goods, chattels, and property of Robert Oswald and others. Mr. Oswald was a partner in the Berwick Gas Company, and the prisoner, a householder in Berwick, had contracted with the company for the supply of his house with gas to be paid for by meter. The meter, which was hired by the prisoner of the company, was connected with an entrançe pipe, through which it received the gas from the company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The prisoner had the control of the stopcock at the meter, by which the gas was admitted into it through the entrance pipe, and he only paid the company and had only to pay them for such quantity of gas as appeared by the index of the meter to have passed through it. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying for the full quantity of gas consumed, and without the consent or knowledge of the company, had caused to be inserted a connecting pipe with a stopcock upon it into the entrance and exit pipes and extending between them; and the entrance pipe being charged with the gas of the company, he shut the stop-cock at the meter so that gas could not pass into it, and opened the stop-cock in the connecting pipe, when a portion of the gas ascended through the connecting pipe into the exit pipe and from thence to the burners and was consumed there, and the gas continued so to ascend and be consumed until by shutting the stop-cock in the connecting pipe the supply was cut off. This operation was proved to have taken place at the time specified by the prosecutor. It was contended for the prisoner that the entrance pipe into which the gas passed from the main being the property of the prisoner, he was in lawful possession of the gas by the consent of the company as soon as it had been let into his entrance pipe out of their main, and that his diverting the gas in its course to the meter was not an act of larceny. I told the jury that if they were of opinion on the evidence that the entrance pipe was used by the company for the conveyance of the gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed through the meter, his property in the pipe was no answer to the charge; that there was nothing in the nature of gas to prevent its being the subject of larceny; and that the stopcock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an *asportavit* by the prisoner; and that if the gas was so abstracted with a fraudulent intent he was guilty of larceny. The jury answered the questions put to them in the affirmative and found the prisoner guilty; I postponed judgment, taking recognizance of bail according to the statute for the appearance of the prisoner at the next Sessions to receive judgment if this court should be of opinion that he was rightly convicted.

Ballantine for the prisoner. The prisoner was not guilty of larceny. He received the gas with the full consent of the company, and the evidence only shows that he did not account with the company according to his contract. The prisoner was guilty of fraud in evading the accounting by the meter, but his conduct was not felonious.

LORD CAMPBELL, C. J. He took the gas from the company against their will instead of receiving it properly and accounting for it.

Ballantine. The Gas Works Clauses Act, 10 Vict. c. 15, § 18, provides a specific penalty for this very offence, which would hardly have been done if it had been regarded as a larceny.

MAULE, J. That clause may be intended to provide against frauds of a different kind, such as damaging the machinery or altering the index of the meter, which would not be larceny.

LORD CAMPBELL, C. J. Is not this a taking *invito domino?*

Ballantine. The delivery of the gas is voluntary and the possession was not obtained by fraud.

MAULE, J. The taking was by turning the gas into a new channel without the leave of the company and that was done with intent to defraud.

Ballantine. There was no trespass.

MAULE, J. If this gas when taken was in the lawful possession of the prisoner and he was only guilty of a breach of contract in not accounting, you must say the same of the surreptitious introduction of new burners.

Ballantine. An evasion of the meter and an interference with it stand on the same ground. The meter is only the voucher of an account, and if there is a delivery according to contract on the one hand and only a fraudulent dealing with a voucher on the other, there is no larceny.

LORD CAMPBELL, C. J. I think that the conviction ought to be affirmed and that the direction of the learned recorder was most accurate. Gas is not less a subject of larceny than wine or oil; but is there here a felonious asportation? No one who looks at the facts can doubt it. The gas no doubt is supplied to a vessel which is the property of the prisoner, but the gas was still in the possession of the company. Then, being in the possession of the company and their property, it is taken away *animo furandi* by the prisoner. If the property remains in the company until it has passed the meter, — which is found, — to take it before it has passed the meter constitutes an asportation. If the asportation was with a fraudulent intent — and this the jury also have found — it was larceny. As to the Act of Parliament the legislature has for convenience sake added a specific penalty, but that cannot reduce the offence to a lower degree. My brother Maule has, however, given a probable explanation of that provision.

Parke, B., Maule, J., Talfourd, J., and Martin, B., concurred.

Conviction affirmed.

COMMONWEALTH *v.* BARRY.

Supreme Judicial Court of Massachusetts. 1878.

[*Reported* 125 *Massachusetts*, 390.]

Indictment for larceny of a trunk and its contents.

At the trial in the Superior Court, before Dewey, J., it was proved that one Kerr, a travelling salesman from New York, had caused the trunk in question to be checked at the Union Station in Worcester, for Hartford, Connecticut, at about half-past four in the afternoon of May 11, and had himself taken a train leaving at that time; but, as there was not time to load the trunk, it was retained in the baggage room at Worcester until the departure of the express train leaving Worcester for Hartford at half-past ten at night, when it was put upon the cars, and arrived at New York early on the morning of May 12, with a New York check upon it; that one Briggs arrived in New York on the same train, and with a check corresponding with the check on the trunk, obtained the trunk and took it to a hotel; that the trunk was subsequently sent by him to Baltimore, where it was afterwards found by its owner, rifled of its contents; and that Briggs was convicted in New York of the larceny of the trunk and its contents, and was sentenced to the state prison.

There was also evidence tending to show that Briggs, in company with the defendant, was at the Union Station in Worcester on the afternoon and evening of May 11; that Briggs caused a valise to be checked for New York, which was placed by the baggage master on the trunk in question; that the defendant, according to a preconcerted plan between him and Briggs, got over the counter at the window of the baggage room where baggage is checked, without permission, and asked the baggage master to permit him to place a package in the valise, showing a check for the same; that he was permitted to do this, and, while he was at the valise and trunk, Briggs called the attention of the baggage master to the window by a question, and the defendant changed the checks on the valise and trunk, and at once left the baggage room through a regular exit. This was all the evidence as to what the defendant did to the trunk at the station.

The defendant requested the judge to give the following instructions: "1. On the whole evidence, the jury would not be warranted in finding the defendant guilty. 2. If the jury find that all that the defendant did was, according to a preconcerted plan with some person, to change the checks on the trunk and valise, and that the asportation of the trunk and its contents was done by some other person, they cannot convict of larceny. 3. There is no evidence in the case to warrant the jury in finding that the defendant did anything more than to change the checks on the trunk and valise, having previously arranged with some other person so to do. 4. If the jury find that the defendant arranged with Briggs that the former should change the checks on the trunk and valise, and he did so change the checks, and if, in pursuance of the plan, Briggs accompanied the trunk on the same train to New York and there received the trunk from the railroad company and rifled it of its contents, and there is no evidence which satisfies the jury that the defendant was present with Briggs in New York, and with him received the trunk, they cannot convict."

The judge refused to give these instructions; but instructed the jury that it was necessary and was sufficient, in order to convict the defendant, that they should be satisfied beyond a reasonable doubt "that the defendant, at the railroad station in Worcester, fraudulently and feloniously took the trunk into his temporary possession and control, and while so having it fraudulently, with the intent to continue to have said trunk under his control, and appropriate it to his own use or the use of himself and confederate, fraudulently and feloniously took off the Hartford check from the same, which the railroad company had placed on it, the owner having a corresponding check, and placed thereon a check of the company for New York, whereof he held a corresponding check which would entitle him to have the trunk transported to New York, and to receive the trunk in New York of the company on its arrival there, and the trunk was carried to New York as the trunk of the defendant, or of which he was entitled to the possession and control, and, by reason of the changed check thereon, the trunk with its contents were, on its arrival at New York, delivered to the defendant or to some person for him."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. S. B. Hopkins, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

LORD, J. We do not understand that the presiding justice intended, by the language used, to instruct the jury that the temporary possession referred to in the instructions was, in itself, an asportation. It does not appear that the question whether there was an asportation at or before the changing of the checks was raised at the trial, or that the attention of the court was called to that subject. An asportation at that precise time was unimportant. The real question was, whether the defendant then, feloniously and with intent to steal, set in motion an innocent agency, by which the trunk and contents were to be removed from the possession of the true owner, and put into the defendant's possession, and by means of such agency effected the purpose; and the temporary possession and control, to which the court referred, must be understood to mean such possession and control as enabled the defendant to execute the device by which, through such innocent instrumentality, he should become possessed of the property.

There was evidence tending to show that the defendant and Briggs were acting in pursuance of a common purpose, and that the acts of each were the acts of both; and, inasmuch as no question was raised upon this subject, it is taken to be true that what one did was the act of both, and that the subsequent actual possession of the trunk by Briggs was the possession of the defendant. It will be seen, therefore, that, by the instructions of the presiding judge, the jury were authorized to find the defendant guilty of larceny, if, in the mode stated, he or his confederate in action obtained possession of the trunk and its contents.

This, as we understand, has been the law from the earliest period: "There is no occasion that the carrying away be by the hand of the party accused, for if he procured an innocent agent to take the property," by means of which he became possessed of it, "he will himself be a principal offender." 3 Chit. Crim. Law, 925. It is held to be a larceny "if a person, intending to steal my horse, take out a replevin, and thereby have the horse delivered to him by the sheriff; or if one intending to rifle my goods get possession from the sheriff, by virtue of a judgment obtained without any the least color or title, upon false affidavits, &c.; in which cases, the making use of legal process is so far from extenuating that it highly aggravates the offence, by the abuse put on the law in making it serve the purposes of oppression and injustice." 1 Hawk. c. 33, § 12. 1 Hale P. C. 507. Chissers' case, T. Raym. 275. Wilkins' case, cited in 1 Hawk. c. 33, § 22; s. c. 1 Leach (4th ed.) 520. It will thus be seen that an asportation may be effected by means of innocent human agency, as well as by mechanical agency, or by the offender's own hand.

The case has been argued as if it was intended by the presiding justice to rule that the jury must find that, at the instant of the exchange of the checks, there was such an actual manual change in the possession as of itself to be an asportation. We do not so understand the instruction. An asportation at that time was unimportant. The real question was, whether the defendant at that time feloniously and with intent to steal, set in motion an innocent agency, by which the trunk and contents were to be removed from the possession of the true owner, and put into the defendant's possession, and whether such purpose was actually accomplished. If, before the trunk had been started, the scheme had been detected, the offence of the defendant would have been an attempt to commit larceny, and doing an act towards the commission of it, but failing in the perpetration; but, as soon as the asportation was complete, for however short a distance, the offence of larceny was committed, such asportation having been caused by him, by fraudulent means, and through an innocent agent, unconscious of what, in fact, he was doing. As soon as the trunk was placed on board the cars, checked, with the corresponding check in the possession of the defendant or his confederate, the trunk and its contents were in the possession and control of the defendant or his confederate, and it is immaterial of which. Nor is the time when the actual manual possession came into the hands of the parties important, they having all the time the constructive possession and the real control of it.

The instructions prayed for by the defendant's counsel were properly refused, because they wholly omitted all reference to the purpose and intent of the defendant in what he did, and all reference to the fact that the defendant was an accomplice of Briggs, or that the actual subsequent possession by Briggs was, or might be, the possession of the defendant. The request to instruct the jury that, upon the whole evidence, they would not be warranted in finding the defendant guilty, was also properly refused. *Exceptions overruled.*

EDMONDS *v.* STATE.

SUPREME COURT OF ALABAMA. 1881.

[*Reported* 70 *Alabama*, 8.]

SOMERVILLE, J. The indictment in this case charges the defendant with the larceny of a hog, which, under the statute, is made a felony, without reference to the value of the animal stolen. Code, 1876, § 4358. The only evidence in the case, showing any caption, or asportation of the animal, was the testimony of an accomplice, one Wadworth, who made the following statement: "That shortly after dark, on the 18th of February last, witness met defendant near the horse-lot, on the plantation of one Ilges; that the two went together to witness' house, where the latter procured an axe, and they then returned to the lot. Witness then got some corn, and after giving defendant the axe, by dropping some of the corn on the ground tolled the hog to the distance of about twenty yards; that the defendant then struck the hog with the axe, and the hog squealed, whereupon immediately both witness and defendant ran away, leaving the hog where it was." Upon this state of facts, the court charged the jury that if they believed the evidence, it was sufficient to show such a taking and carrying away of the property, if done feloniously, as was necessary to make out the offence of larceny.

We think the court erred in giving this charge, though the question presented is not free from some degree of doubt and difficulty. The usual definition of larceny is, "the felonious taking and carrying away of the personal goods of another." 4 Black. Com. 229. It is defined in Roscoe's Criminal Evidence, as "the wrongful taking possession of the goods of another, with intent to deprive the owner of his property in them." Rosc. Cr. Ev. 622. It is a well settled rule, liable to some few exceptions, perhaps, that every larceny necessarily involves a trespass, and that there can be no trespass, unless there is an actual or constructive taking of possession; and this possession must be entire and absolute. Roscoe's Cr. Ev. 623–24; 3 Greenl. Ev. § 154. There must not only be such a caption as to constitute possession of, or dominion over the property, for an appreciable moment of time, but also an asportation, or carrying away, which may be accomplished by any removal of the property or goods from their original status, such as would constitute a complete severance from the possession of the owner. 1 Greenl. Ev. § 154; Roscoe's Cr. Ev. p. 625. It has been frequently held that to chase and shoot an animal, with felonious intent, without removing it after being shot, would not be such a caption and asportation as to consummate the offence of larceny. Wolf *v.* The State, 41 Ala. 412; The State *v.* Seagler, 1 Rich. (S. C.) 30; 2 Bish. Cr. Law, § 797. So it has been decided that the mere upsetting of a barrel of turpentine, though done with felonious intent, does not complete the offence, for the same reason. The State *v.* Jones, 65 N. C. 395. The books are full of cases presenting similar illustrations.

On the contrary, it is equally well settled that where a person takes an animal into an inclosure, with intent to steal it, and is apprehended before he can get it out, he is guilty of larceny. 3 Inst. 109. In Wisdom's case, 8 Port. 507, 519, it was said, *arguendo*, by Mr. Justice Goldthwaite, "If one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it, and has it once under his control, the deed is complete; but, if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offence would not be consummated." This principle is, no doubt, a correct one; but the true difficulty lies in its proper application. It is clear, for example, if one should thus entice an animal from the possession, actual or constructive, of the owner, and toll it into his own inclosure, closing a gate behind him, the custody or dominion acquired over the animal might be regarded as so complete as to constitute larceny. 2 Bish. Cr. Law, § 806. It is equally manifest that, if one should, in like manner, entice an animal, even for a considerable distance, and it should, from indocility, or other reason, follow him so far off as not to come virtually into his custody, the crime would be incomplete.

The controlling principle, in such cases, would seem to be that the possession of the owner must be so far changed as that the dominion of the trespasser shall be complete. His proximity to the intended booty must be such as to enable him to assert this dominion, by taking actual control or custody by manucaption, if he so wills. If he abandon the enterprise, however, before being placed in this attitude, he is not guilty of the offence of larceny, though he may be convicted of an attempt to commit it. Wolf's case, 41 Ala. 412. It would seem there can be no asportation, within the legal acceptation of the word, without a previously acquired dominion.

The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them that there was such a complete caption and asportation as to consummate the offence.[1]

The judgment of the Circuit Court is reversed, and the cause is remanded.

THOMPSON v. STATE.

Supreme Court of Alabama.

[*Reported* 94 *Alabama*, 535.]

Walker, J. The witness for the State testified that he held out his open hand with two silver dollars therein, showing the money to the defendant; that the defendant struck witness' hand, and the money was either knocked out of his hand or was taken by the defendant, he could not tell positively which. It was after twelve o'clock at night, and the witness did not see the money, either in defendant's possession or on the ground. The court charged the jury: "If the jury find from the evidence that the defendant, with a felonious intent, grabbed for the money, but did not get it, but only knocked it from the owner's hand with a felonious intent, this would be a sufficient carrying away of the money, although defendant never got possession at any time of said money." This charge was erroneous. To constitute larceny, there must be a felonious taking and carrying away of personal property. There must be such a caption that the accused acquires dominion over the property, followed by such an asportation or carrying away as to supersede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offence is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control. Frazier v. The State, 85 Ala. 17; Croom v. The State, 71 Ala. 14; Edmunds v. The State, 70 Ala. 8; Wolf v. The State, 41 Ala. 412. It is not enough that the money was knocked out of the owner's hand, if it fell to the ground and the defendant never got possession of it. The defendant was not guilty of larceny if he did not get the money under his control. If the attempt merely caused the money to fall from the owner's hand to the ground, and the defendant ran off without getting it, the larceny was not consummated, as the dominion of the trespasser was not complete. Charge No. 1 was a proper statement of the law as applicable to the evidence above referred to, and it should have been given.[1] *Reversed and remanded.*

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[1] *Acc.* Hardeman v. State, 12 Tex. App. 207. See Croom v. State, 71 Ala 14; Lundy v. State, 60 Ga. 143; State v. Alexander, 74 N. C. 232 — Ed.

PEOPLE v. MEYER.

SUPREME COURT OF CALIFORNIA.

[*Reported* 75 *Cal.* 383.]

SHARPSTEIN, J.[2] — The defendant was tried on an information, in which it was charged that he wilfully, unlawfully, and feloniously stole, took, and carried away one overcoat, of the value of twenty dollars, the personal property of Harris Joseph and Lewis Joseph. On the trial Lewis Joseph testified as follows: —

"I had, as usual, placed and buttoned an overcoat upon a dummy which stood on the sidewalk outside of my store. I was inside the store and heard the chain of the dummy rattle, and on coming outside, found defendant with said coat unbuttoned from the dummy and under his arm, the same being entirely removed from the dummy, and about two feet therefrom and from the place where it had been originally placed on the dummy by me, and the accused was in the act of walking off with said coat when grabbed by me, he being prevented from taking it away because said coat was chained to the dummy by a chain which ran through the coat-sleeve, and the dummy was tied to the building by a string."

This was the only evidence introduced to prove the charge of larceny. The jury on this evidence returned a verdict of guilty of petit larceny as charged, and the defendant, having pleaded guilty of prior convictions of other petit larcenies, was sentenced to imprisonment in the state prison for the term of two years.

He moved for a new trial, which was denied, and from that order and the judgment this appeal is taken.

Appellant insists that the verdict is contrary to the evidence, which it is claimed does not prove that the defendant carried away the coat which he is charged with having stolen, but proves he did not.

"Larceny," as defined in the Penal Code of this state, "is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." This is substantially the common-law definition, under which it was held that it must be shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment. Thus where goods were tied by a string, the other end of which was fastened to the counter, and the thief took the goods and carried them towards the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony. (3 Greenl. Ev., sec. 155.)

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[1] *Acc.* Rex *v.* Farrel, 2 East P. C. 557; Com. *v.* Luckis, 99 Mass. 431. — ED.

[2] Part of the case discussing a question of evidence is omitted.— ED.

"In the language of the old definition of larceny," says Bishop, "the goods taken must be carried away. But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is, that any removal, however slight, of the entire article, which is not attached either to the soil or to anything not removed, is sufficient; while nothing short of this will do." (2 Bishop's Crim. Law, sec. 794.)

The attorney-general admits that this is the doctrine of the English cases.

In State *v.* Jones, 65 N. C. 395, the court says: "There must be an asportation of the article alleged to be stolen to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the courts of England, and the rules there established have been generally observed by the courts of this country."

People *v.* Williams, 35 Cal. 671, was not so clearly within the rule as this case is, but the court said that it did not feel at liberty to depart from a rule so long and so firmly established by numerous decisions. Tested by that rule, the evidence in this case was clearly insufficient to justify the verdict, and the defendant is entitled to a new trial on that ground. *Judgment and order reversed.*

STATE *v.* HUNT.

SUPREME COURT OF IOWA. 1877.

[*Reported* 45 *Ia.* 673.]

DEFENDANT was indicted and convicted of the crime of grand larceny, and sentenced to confinement in the penitentiary for eighteen months. His case is brought to this court on appeal.

BECK, J.[1] The main objection to the conviction of defendant is based upon the ground that the evidence does not support the verdict of the jury. The property which defendant was charged with stealing was a steer. It was impounded by the marshal of Independence, and advertised for sale, under a city ordinance. At the day of sale, defendant, who was employed as auctioneer to sell the animal and another in the pound, claimed the steer and sold it to a butcher, by whom it was killed. The owner of the steer, after it was butchered, identified it by the hide and certain marks. There can be no doubt that it was his property; in fact, this is not denied. Defendant, upon the owner making claim to the property, paid him the sum he had received from the butcher. It is insisted that the evidence fails to show a felonious intent on the part of defendant, but establishes the fact that the property was sold by defendant under the honest claim and belief that it was his own. It is true that the defendant, after he had seen the steer in the pound, did state that it was his property, and that it had strayed from his possession. But accompanying this claim was an inquiry addressed to the marshal as to the consequences that would result if it proved to be the property of another. He was informed that he would be required to pay the owner the value of the animal. . . .

It is argued that there was no evidence of the taking of the animal — that if it be conceded the property was not defendant's and was not sold in the belief of his ownership, the facts show simply a sale of property by defendant which he did not own, and not a larceny. But defendant asserted his ownership and claimed the possession by the sale. And further, he authorized the butcher to take the steer from the pound. This was a sufficient "taking," and as it was done under defendant's authority it must be regarded as his act.

Affirmed.

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[1] Part of the opinion is omitted. — ED.

ALDRICH *v.* PEOPLE.

SUPREME COURT OF ILLINOIS. 1906.

[*Reported* 224 *Ill.* 622.]

THE record in this case brings up for review the judgment of conviction of Roy Aldrich for the crime of larceny.

The facts developed on the trial were, in substance, as follows: In July, 1905, Miss Flora May Barr checked her trunk at Grand Haven, Michigan, for Chicago, and took passage on one of the steamships belonging to the Goodrich Transportation Company. She left Grand Haven about 9.15 on the evening of July 10 and arrived at Chicago about six o'clock on the morning of the 11th. At Chicago Miss Barr gave the check for her trunk to a transfer company, with instructions to transfer it to the Burlington depot and re-check it to Oakland, California, which was done. Miss Barr saw the baggageman attach the check to her trunk at Grand Haven, where she received a duplicate check, but she did not see the trunk again before leaving Chicago for Oakland. Upon her arrival at Oakland she gave her trunk check to a transfer company, with instructions to deliver the trunk to her at the place where she intended to stop. When the trunk was brought to her she at once discovered that it was not her trunk. She refused to receive the trunk, although it had a check attached to it corresponding to the one which she had received for her trunk at Chicago. The trunk which was sent to Oakland was a zinc-covered trunk with an oval top, while Miss Barr's trunk was a canvas-covered trunk and of a different shape. Miss Barr's trunk contained between $300 and $400 worth of wearing apparel and other articles of value which she intended to take with her on her summer trip to California, while the trunk which was brought to her at Oakland was afterwards found to contain nothing except waste paper and rubbish. She immediately notified the Goodrich Transportation Company of the loss of her trunk and shipped the empty trunk back to Chicago. The Goodrich Transportation Company instituted a search for the missing trunk. About a week or ten days after Miss Barr passed through Chicago an unknown man appeared at the baggage room of the Goodrich Transportation Company in Chicago with two trunks, bought a ticket, and checked the trunks to Milwaukee. The servants of the transportation company, in handling the two trunks, discovered that they were apparently empty, — at least they were very light. It was also noticed that both of these trunks had the locks broken and that they were fastened with ropes or straps. When the boat arrived at Milwaukee plaintiff in error presented two checks and demanded the two trunks. The employees in charge of the boat, suspecting that this transaction might not be all right, refused to deliver the trunks to Aldrich in Milwaukee, but agreed to re-check them for him back to Chicago, which they did. The trunks were not called for after their return to Chicago for several days. Finally plaintiff in error presented checks and demanded the two trunks. The transportation company again refused to deliver the trunks to plaintiff in error. Plaintiff in error called a second time and demanded the trunks, and threatened legal proceedings unless they were delivered to him. In the meantime one of the trunks had been positively identified as Miss Barr's lost trunk. It was afterwards learned that a man by the name of Frank Bushre had hauled the two empty trunks from a room occupied by plaintiff in error in a house at 128 Dearborn avenue, Chicago. It is also shown that plaintiff in error and a woman known as Daisy Dean occupied the room from which the trunks were obtained by Bushre. Plaintiff in error was then arrested on a charge of larceny of the Barr trunk and its contents. In the room occupied by plaintiff in error and the woman were found substantially all of the articles which Miss Barr had packed in her trunk in Grand Haven, Michigan, and these articles were afterwards identified by her as her property. There was also found in this room a large quantity of other goods of various description, among other things, two tickets from Grand Haven to Chicago which had never been used.

The theory of the prosecution is, that plaintiff in error, somewhere between Grand Haven and Chicago, transferred the check from the zinc-covered trunk to Miss Barr's trunk and from her trunk to the zinc-covered trunk, and that the plaintiff in error secured possession of Miss Barr's trunk by having the duplicate of the check that was originally attached to the zinc-covered trunk. Plaintiff in error denies all connection with the theft, and claims that he bought the stolen trunk, together with another large trunk, from a man by the name of Doc. Lebey. His explanation as to how he obtained possession of the lost trunk is not corroborated by any testimony in the record or by facts and circumstances.

The indictment charged the plaintiff in error with feloniously stealing one trunk and various articles of personal property, the personal goods and property of the Goodrich Transportation Company, a corporation of the State of Wisconsin. The jury found plaintiff in error guilty and found the value of the property stolen to be $230. Motions for a new trial and in arrest of judgment were made and severally overruled, and plaintiff in error was sentenced to an indeterminate term of imprisonment in the penitentiary.

VICKERS, J.[1] . . . The Goodrich Transportation Company held the trunk and its contents merely as bailee of the rightful owner, of which plaintiff in error must, upon the theory of the prosecution, be presumed to have had notice, and therefore such transportation company had no authority to consent to the title passing, with the possession, to plaintiff in error. But even if it could be held that the corporation could have given such consent by its proper officers, it certainly cannot be said that the mere act of its servants in turning over the trunk to plaintiff in error upon the mistaken supposition that he was entitled to the possession thereof, would amount to such a consent as is necessary to bring the case within the rule contended for by plaintiff in error. In McClain on Criminal Law (vol. 1, sec. 558,) it is said: "The fact that the servant in whose possession the property is, consents to its taking will not prevent the act being larceny, he having no authority to consent, and the wrongdoer being aware of that fact." (State *v.* McCartey, 17 Minn. 76; People *v.* Griswold, 64 Mich. 722; State *v.* Edwards, 36 Mo. 394.) It seems clear, on principle, that if property is obtained from an infant or an insane person, who is legally disqualified from giving consent, with the felonious intent to steal the same, such consent could not be availed of as a defence to a charge of larceny. The same principle ought to apply to bailees, whose interest in the property is known to the alleged thief.

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[1] Part of the opinion is omitted. — ED.

In our opinion the case at bar is not controlled by the principle contended for by the plaintiff in error. The case comes within the rule laid down in Commonwealth *v.* Barry, 125 Mass. 390.

It will thus be seen that an asportation may be effected by means of innocent human agency as well as mechanical agency, or by the offender's own hands. One may effect an asportation of personal property so as to be guilty of larceny by attaching a gas-pipe to the pipes of the company and thus draw the gas into his house and consuming it without its passing through the meter. (Clark and Marshall on Law of Crimes, p. 446, and cases cited in note; Woods *v.* People, 222 Ill. 293.) From these cases the law appears to be well settled that where, with the intent to steal, the wrongdoer employs or sets in motion any agency, either animate or inanimate, with the design of effecting a transfer of the possession of the goods of another to him in order that he may feloniously convert and steal them, the larceny will be complete, if in pursuance of such agency the goods come into the hands of the thief and he feloniously converts them to his own use, and in such case a conviction may be had upon a common-law indictment charging a felonious taking and carrying away of such goods. If in the case at bar the accused shifted the checks on the trunks, by means of which the servants of the transportation company were innocently led to further the criminal purpose by delivering the trunk in question to the accused, who received and converted the same to his own use, and if there was in the mind of the plaintiff in error a felonious intent to steal this property pervading the entire scheme and attending every step of it, then he is guilty of larceny, and the instruction under consideration as applied to such a state of facts is a correct statement of the law and there was no error in giving it to the jury.

Judgment affirmed.

SECTION II. (*continued*).

(*b*) Distinction between Possession and Custody.

Littleton, Tenures, Sect. 71. If I lend to one my sheep to tathe his land, or my oxen to plow the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending.

Coke, First Institute, *ad loc.* And the reason is, that when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespass *sur le case* for this conversion, at his election.

ANONYMOUS.

Assizes. 1353.

[*Reported Liber Assisarum*, 137, *pl.* 39.]

One A. was arraigned with the mainor, sc. a coverlet and two sheets; and he put himself on his clergy. And it was found by the inquest that he was a guest at the house of a man of note, and was lodged within these bedclothes; and it was found that he got up before day, and took these bedclothes out of the chamber, and carried them into the hall, and went off to the stable to find his horse; and his host summoned his household against him. And it was asked of the inquest whether he carried the bedclothes into the hall with intent to have stolen them; and they said yes. Wherefore he was adjudged a felon, and was delivered to the ordinary, because he was a clerk, etc.[1]

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[1] After reporting this case, Staunforde (Pleas of the Crown, 26) adds: "And yet the thing stolen seems never to have been out of the owner's possession, for it had not passed out of the house; so *quære* what the law would be in such a case at this day. For no wonder it was allowed for law at this time, *sc., regnante Edwardo tertio, quia tunc temporis voluntas reputabatur pro facto, &c.*" See *acc.* State *v.* Wilson, Coxe (N. J.) 439. — Ed.

ANONYMOUS.

OLD BAILEY. 1664.

[*Reported Kelyng*, 35.]

A SILK throster had men come to work in his own house, and delivered silk to one of them to work, and the workmen stole away part of it. It was agreed by Hyde, Chief Justice, myself and Brother Wylde being there, that this was felony, notwithstanding the delivery of it to the party, for it was delivered to him only to work, and so the entire property remained only in the owner, like the case of a butler who hath plate delivered to him; or a shepherd, who hath sheep delivered, and they steal any of them, that is felony at the common law. Vid. 13 Eliz. 4, 10; 3 H. VII., 12; 21 H. VII., 14; *Accord* Poulton de Pace, 126.[1]

REX *v.* CHISSERS.

EXCHEQUER. 1678.

[*Reported T. Raymond*, 275.]

UPON a special verdict the jury find that, on the day and at the place in the indictment mentioned, Abraham Chissers came to the shop of Anne Charteris, spinster, in the said indictment likewise named, and asked for to see two cravats in the indictment mentioned, which she shewed to him, and delivered them into his hands, and thereupon he asked the price of them, to which she answered 7*s.*; whereupon the said Abraham Chissers offered her 3*s.*, and immediately run out of the said shop, and took away the said goods openly in her sight; but whether this be felony or not is the question. And if it shall be adjudged felony, we find him guilty, and that the goods were of the value of 7*s.*, and that he had no goods or chattels, etc.; but if it be not adjudged felony, we find him not guilty, nor that he fled for the same.

And I am [of] opinion that this act of Chissers is felony; for that, 1. he shall be said to have taken these goods, *felleo animo;* for the act subsequent, namely, his running away with them, explains his intent precedent; as the suing a replevin to get the horse of another man, to which he hath no title, is felony, because *in fraudem legis*, Co. 3 Inst. 108. So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by color thereof, takes his goods, it is felony: Dalton's Office of Sheriffs, cap.

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[1] See *acc.* U. S. *v.* Clew, 4 Wash. C. C. 700; Marcus *v.* State, 26 Ind. 101; Gill *v.* Bright, 6 T. B. Mon. 130; State *v.* Jarvis, 63 N. C. 556; State *v.* Self, 1 Bay 242. —ED.

121, fol. 489. And the case of one Far, in which I myself was a counsel, was thus: Far, knowing one Mrs. Steneer, living in St. Martin's Lane, in Middlesex, to have considerable quantity of goods in her house, procured an affidavit to be filed in the Common Pleas of the due delivery of a declaration, in an action of *ejectione firmæ,* in which he was lessor, though he had no title, and thereupon got judgment, and took out an *habere facias possessionem* for the house, directed to the sheriff of Middlesex, and procured him to make a warrant to a bailiff to execute the writ, who with Far came to the house, turned Mrs. Steneer out of possession thereof, and seized upon the goods, of a great value, and converted them to his own use, and upon complaint made by Mrs. Steneer to Sir Robert Hyde, then Lord Chief Justice of B. R., Far was apprehended by his warrant, and indicted at Justice Hall in the Old Bailey, and found guilty, and hanged; for that he used the color of an action of ejectment and the process thereupon to execute his felonious intent, *in fraudem legis.*

2. Although these goods were delivered to Chissers by the owner, yet they were not out of her possession by such delivery, till the property should be altered by the perfection of the contract, which was but inchoated and never perfected between the parties; and when Chissers run away with the goods, it was as if he had taken them up, lying in the shop, and run away with them. *Vide* Hill. 21 H. VII. 14 pl. 21.[1]

REGINA *v.* SLOWLY.

Crown Case Reserved. 1873.

[*Reported* 12 *Cox C. C.* 269.]

Case reserved for the opinion of this court by Mr. Justice Byles.

The prisoners, at the last Winter Assizes for the county of Sussex at Lewes, were jointly indicted for stealing onions.

The prosecutor, having a cart loaded with onions, met the prisoners, who agreed to buy all the onions at a certain price, namely, £3 16*s.* for ready money, the prisoners saying, "You shall have your money directly the onions are unloaded."

The onions were accordingly unloaded by the prosecutor and the prisoners together, at a place indicated by the prisoners.

The prosecutor then asked for his money. The prisoners thereupon asked for a bill, and the prosecutor made out a bill accordingly. One of the prisoners said they must have a receipt from the prosecutor, and in the presence of the other made a cross upon the bill, put a one penny postage stamp on it, and then said they had a receipt, and refused to restore the onions or pay the price.

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[1] See Bassett *v.* Spofford, 45 N. Y. 387. — Ed.

The next morning the prisoners offered the onions for sale at Hastings.

The jury convicted both the prisoners of larceny, and said they found that the prisoners never intended to pay for the onions, and that the fraud was meditated by both the prisoners from the beginning. The prisoners' counsel insisting that under these circumstances there was no larceny, I reserved the point for the decision of the Court of Criminal Appeal.

(Signed) J. BARNARD BYLES.

Willoughby, for the prisoners. The prisoners were not properly convicted of larceny, for the prosecutor gave credit to the prisoners for the £3 16*s.*, and delivered the onions to them on such credit. [KELLY, C. B. What credit was given? The case is like Reg. *v.* McGrath (39 L. J. 7, M. C.; 11 Cox C. C. 347).] This is a different case. There the money was obtained against the will of the owner. Here the onions were unloaded by the prosecutor. Moreover, it was proved, though not stated in the case, that the prosecutor called on the prisoners in the evening for the money.

The learned counsel then cited 2 East P. C. 669 (edit. A.D. 1805), and the cases of Rex *v.* Harvey and Reg. *v.* Nicholson, there cited. Also Rex *v.* Oliver, 2 Leach, 1072; R. *v.* Adams, 2 Rus. on Crimes, 209; Tooke *v.* Hollingsworth, 5 T. R. 231 (Buller, J.); Reg. *v.* Small, 8 C. & P. 46; Reg. *v.* Stewart, 1 Cox C. C. 174; Reg. *v.* McKale, 37 L. J. 97, M. C.; 11 Cox C. C. 32.

Pocock, for the prosecution, was not called upon to argue.

KELLY, C. B. I am of opinion that the conviction should be affirmed. If in this case it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny; but it is clear that no credit was given or ever intended to be given. Any idea of that is negatived by the statement in the case that the prisoners agreed to buy for ready money. In all such sales the delivery of the thing sold, or of the money, the price of the thing sold, must take place before the other; *i. e.*, the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny.

MELLOR, J. I am of the same opinion. The prisoners obtained possession of the onions by a trick, and never intended to pay for them, as the jury found. From the very first they meditated the fraud to get possession of them, which puts an end to any question of its being larceny or not.

PIGOTT, B. The facts are that the prosecutor never intended to part with the possession of the onions except for ready money. He did part with the possession to the prisoners, who obtained the possession by fraud. The prisoners then brought in aid force to keep possession, and refused to restore the onions or pay the price. Therefore the possession was obtained against the will of the prosecutor.

DENMAN, J., and POLLOCK, B., concurred.[1]

Conviction affirmed.

COMMONWEALTH *v.* O'MALLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[*Reported* 97 *Massachusetts*, 584.]

HOAR, J.[2] We are of opinion that there was no evidence to sustain the indictment for embezzlement, and that the conviction was wrong. The defendant had been previously acquitted of larceny upon proof of the same facts; and it is therefore of great importance to him, if the offence committed, if any, was larceny, that it should be so charged.

To constitute the crime of embezzlement, the property which the defendant is accused of fraudulently and feloniously converting to his own use, must be shown to have been entrusted to him, so that it was in his possession, and not in the possession of the owner. But the facts reported in the bill of exceptions do not show that the possession of the owner of the money was ever divested. She allowed the defendant to take it for the purpose of counting it in her presence, and taking from it a dollar, which she consented to lend him. The money is alleged to have consisted of two ten-dollar bills, three five-dollar bills, a two-dollar bill, and a one-dollar bill, amounting in all to thirty-eight dollars. The one dollar he had a right to retain, but the rest of the money he was only authorized to count in her presence and hand back to her. He had it in his hands, but not in his possession, any more than he would have had possession of a chair on which she might have invited him to sit. The distinction pointed out in the instructions of the court between his getting it into his hands with a felonious intent, or forming the intent after he had taken it, was therefore unimportant. The true distinction, upon principle and authority, is that stated by the cases upon the defendant's brief, that if the owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, *animo furandi*, is larceny. Thus in The People *v.* Call, 1 Denio, 120, the defendant took a promissory note to endorse a payment of interest upon it, in the presence of the owner of the note, and then carried it off; and it was held that he was rightly convicted of larceny, although he might have first formed the intention of appropriating it after it was put in his hands. So where a shopman placed some clothing in the hands of a customer, but did not consent that he should take it away from the shop till he should have made a bargain with the owner, who was in another part of the shop, his carrying it off was held to be larceny. Commonwealth *v.* Wilde, 5 Gray, 83. See also Regina *v.* Thompson, 9 Cox Crim. Cas. 244; Regina *v.* Janson, 4 Cox Crim. Cas. 82. In all such cases the temporary custody for the owner's purposes, and in his presence, is only the charge or custody of an agent or servant; gives no right of control against the owner; and the owner's possession is unchanged. *Exceptions sustained.*[1]

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[1] See Reg. *v.* Bramley, 8 Cox C. C. 468. — ED.

[2] The opinion only is given; it sufficiently states the case.

HILDEBRAND *v.* PEOPLE.

Court of Appeals of New York. 1874.

[*Reported* 56 *New York*, 394.]

Church, C. J.[2] The prosecutor handed the prisoner, who was a bartender in a saloon, a fifty-dollar bill (greenback) to take ten cents out of it in payment for a glass of soda. The prisoner put down a few coppers upon the counter, and when asked for the change, he took the prosecutor by the neck, and shoved him out doors, and kept the money.

The question is presented on behalf of the prisoner whether larceny can be predicated upon these facts. There was no trick, device, or fraud in inducing the prosecutor to deliver the bill; but we must assume that the jury found, and the evidence was sufficient to justify it, that the prisoner intended, at the time he took the bill, feloniously to convert it to his own use.

It is urged that this is not sufficient to convict, because the prosecutor voluntarily parted with the possession not only, but with the property, and did not expect a return of the same property. This presents the point of the case. When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without trespass. 43 N. Y. 61. But in this case I do not think the prosecutor should be deemed to have parted either with the possession of, or property in, the bill. It was an incomplete transaction, to be consummated in the presence and under the personal control of the prosecutor. There was no trust or confidence reposed in the prisoner, and none intended to be. The delivery of the bill and the giving change were to be simultaneous acts, and until the latter was paid the delivery was not complete. The prosecutor laid his bill upon the counter, and impliedly told the prisoner that he could have it upon delivering to him $49.90. Until this was done neither possession nor property passed; and in the mean time the bill remained in legal contemplation under the control and in the possession of the prosecutor. This view is not without authority. The case of Reg. *v.* McKale, 11 Cox C. C. 32, is instructive. The prosecutrix put down two shillings upon the counter, expecting to receive small change for it from the prisoner. There being several pieces on the counter, the prosecutrix took up a shilling of the prisoner's money, and a shilling of her own, which she did not discover until she was putting them in the drawer. A confederate just then attracted her attention, and the prisoner passed out with the two shillings. It was held, upon full consideration, that the conviction for stealing the two shillings was right. KELLY, C. B., said: "The question is, did she part with the money she placed on the counter? I say, certainly not, for she expected to receive two shillings of the prisoner's money in lieu of it. . . . Placing the money on the counter was only one step in the transaction. The act of the prisoner in taking up the money does not affect the question whether the prosecutrix parted with the property in it. The property is not parted with until the whole transaction is complete, and the conditions have been fulfilled on which the property is to be parted with. . . . I am of the opinion that the property in the two-shilling piece was not out of the prosecutrix for a moment."

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[1] *Acc.* Reg. *v.* Thompson, 9 Cox C. C. 244; People *v.* Johnson, 91 Cal. 265; People *v.* Call, 1 Denio, 120. — Ed.

[2] The opinion only is given; it sufficiently states the case.

In Reg. *v.* Slowly, 12 Cox C. C. 269, the prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor signed a receipt at the request of the prisoners, when they refused to restore the onions or pay the price. A conviction for larceny was held right, the jury having found the original intention felonious. This was upon the ground that the delivery and payment were to be simultaneous acts, that the property did not pass until payment, and that no credit or trust was intended. See also id., 248, 257; 2 Russ. on Cr., 22.

The counsel for the prisoner relies upon the case of Reg. *v.* Thomas, 9 C. & P. 741. There the prosecutor permitted the prisoner to take a sovereign to go out to get it changed. The court held that the prisoner could not be convicted of larceny, because he had divested himself of the entire possession of the sovereign and never expected to have it back. This was a *nisi prius* decision, and is not as authoritative for that reason; but the distinction between that case and this is the one first suggested. There all control, power, and possession was parted with, and the prisoner was intrusted with the money, and was not expected to return it. Here, as we have seen, the prosecutor retained the control and legally the possession and property. The line of distinction is a narrow one, but it is substantial and sufficiently well defined.

The judgment must be affirmed.

All concur. *Judgment affirmed.*[1]

COMMONWEALTH *v.* LANNAN.

Supreme Judicial Court of Massachusetts. 1891.

[*Reported* 153 *Massachusetts*, 287.]

Holmes, J. The defendant is indicted for the larceny of promissory notes, the property of one Teeling, and has been found guilty. The case is before us on exceptions to the refusal of the court below to rule that the evidence was insufficient to support the indictment, and also to the instructions given to the jury. The evidence tended to prove the following facts. The defendant was an attorney employed by Teeling to ascertain the price of certain land. The price mentioned to him was one hundred and twenty-five dollars. He told Teeling that the lowest price was three hundred and twenty-five dollars, three hundred dollars to go to the owners of the land, fifteen to Bent, the agent, with whom the defendant communicated, and ten dollars to the defendant. Teeling assented to the terms, and gave Bent directions as to the deed. When the deed was ready, Teeling, Bent, and the defendant met. The defendant approved the deed, and said to Teeling, "Pay over the money." Teeling counted out three hundred and twenty-five dollars on the table in front of the defendant, who counted it, took it from the table, and requested Bent to go into the next room. He then gave Bent one hundred and twenty-five dollars of the money, returned to Teeling, gave him a receipt for ten dollars and kept the rest of the money. The court instructed the jury "that upon the evidence they might find the defendant guilty of larceny if they were satisfied that he had obtained the money of said Teeling by false premeditated trick or device; that although Teeling might have given the manual custody of the money to the defendant, nevertheless the legal possession would remain in Teeling under such circumstances, and the larceny would be complete when the defendant, after thus getting possession of Teeling's money and inducing him to count out one hundred and ninety dollars more than was needed, appropriated it to his own use."

When the defendant took up the money from the table it had not yet passed under the dominion of Bent, who represented the opposite party. The defendant did not receive it as representing the opposite party; he purported to be acting in the interest of Teeling. The jury would have been warranted in finding that Teeling impliedly authorized the defendant to take up the money from the table, but they only could have found that he allowed him to do so for the purpose of immediately transferring the identical bills, or all but ten dollars of them, to Bent under Teeling's eyes. Subject to a single consideration, to be mentioned later, there is no doubt that in thus receiving the money for a moment the defendant purported at most to act as Teeling's servant, or hand, under his immediate direction and control. Therefore not only the title to the money, but the possession of it, remained in Teeling while the money was in the defendant's custody. Commonwealth *v.* O'Malley, 97 Mass. 584. If the defendant had misappropriated the whole sum, or if he misappropriated all that was left after paying Bent, the offence would be larceny. Commonwealth *v.* Berry, 99 Mass. 428; Regina *v.* Cooke, L. R, 1 C. C. 295; s. c. 12 Cox C. C. 10; Regina *v.* Thompson, Leigh & Cave, 225, 230; 2 East P. C. c. 16, §§ 110, 115. See further Commonwealth *v.* Donahue, 148 Mass. 529, 530, and cases cited.

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[1] *Acc.* Reg. *v.* Johnson, 5 Cox C. C. 372; Levy *v.* State, 79 Ala. 259; State *v.* Fenn, 41 Conn. 590; Huber *v.* State, 57 Ind. 341; State *v.* Anderson, 25 Minn. 66. See State *v.* Watson, 41 N. H. 533 — Ed.

The instructions made the defendant's liability conditional upon his having obtained the money from Teeling by a premeditated trick or device. If he did so, and appropriated all that was left after paying Bent, he was guilty of larceny, irrespective of the question whether Teeling retained possession, according to the dicta in Commonwealth *v.* Barry, 124 Mass. 325, 327, under the generally accepted doctrine that if a party fraudulently obtains possession of goods from the owner with intent at the time to convert them to his own use, and the owner does not part with the title, the offence is larceny. Even if the possession had passed to the defendant, there can be no question that the title remained in Teeling until the money should be handed to Bent. See note to Regina *v.* Thompson, Leigh & Cave, 225, 230.

In this case, however, by the terms of his agreement with Teeling, the defendant had the right to retain ten dollars out of the moneys in his hands, and it may be argued that it is impossible to particularize the bills which were stolen, seeing that the defendant appropriated bills to the amount of one hundred and ninety-five dollars all at once, without distinguishing between the ten he had a right to select and the one hundred and eighty-five to which he had no right. This argument appears to have troubled some of the English judges in one case, although they avoided resting their decision on that ground. Regina *v.* Thompson, Leigh & Cave, 233, 236, 238. If the argument be sound, it might cause a failure of justice by the merest technicality. For it easily might happen that there was no false pretence in the case, and that a man who had appropriated a large fund, some small part of which he had a right to take, would escape unless he could be held guilty of larceny. We think the answer to the argument is this. All the bills belonged to Teeling until the defendant exercised his right to appropriate ten dollars of them to his claim. He could make an appropriation only by selecting specific bills to that amount. He had no property in the whole mass while undivided. If he appropriated the bills as a whole, he stole the whole, and the fact that he might have taken ten dollars does not help him, because he did not take any ten dollars by that title, or in the only way in which he had a right to take it. The later English cases seem to admit that a man may be liable for the larceny of a sovereign given him in payment of a debt for a less amount in expectation of receiving change, as well as in cases like Commonwealth *v.* Berry, *ubi supra,* where there is nothing due the defendant; Regina *v.* Gumble, L. R. 2 C. C. 1; s. c. 12 Cox C. C. 248; Regina *v.* Bird, 12 Cox C. C. 257, 260. See further Hildebrand *v.* People, 56 N. Y. 394.

Although the point is immaterial to the second ground of liability which we have mentioned, we may add that we are not disposed to think that the fact that the defendant may have been expected to select ten dollars for himself during the moment that the bills were in his hands was sufficient to convert his custody into possession. That right on his part was merely incidental to a different governing object, and it would be importing into a very simple transaction a complexity which does not belong there to interpret it as meaning that the defendant held the bills on his own behalf with a lien upon them until he could withdraw his pay.

It is not argued that the averment as to promissory notes is not sustained. Commonwealth *v.* Jenks, 138 Mass. 484, 488.

Exceptions overruled.

REPORTER'S NOTE.

COMMON PLEAS. 1487.

[*Reported Year Book* 3 *Hen. VII.*, 12, *pl.* 9.]

HUSSEY put a question. If a shepherd steals the sheep which are in his charge, or a butler the pieces which are in his charge, or servants other things which are in their charge, whether it shall be called felony. And it seemed to him that it would. And he cited a case which was, that a butler had stolen certain stuff which was in his charge, and was hanged for it. HAUGH [J.] cited the case of Adam Goldsmith of London, who had stolen certain stuff which was in his charge, and was hanged for it. BRIAN [C. J.] — It cannot be felony, because he could not take *vi & armis,* because he had charge of it. And the justices were of the same opinion, and so no discussion, etc. R. see M. 13 E. 4 f. 3, P. 13 E. 4 f. 9, T. 22 E. 3 Coroñ 256, what shall be called felony of goods.

REPORTER'S NOTE.

KING'S BENCH. 1506.

[*Reported Year Book* 21 *Hen.VII.*, 14, *pl.* 21.]

IN the King's Bench *Cutler*, Serjeant, and *Pigot*, apprentice, were at the bar; and Pigot put this question to Cutler: If I deliver a bag of money to my servant to keep, and he flees and goes away from me with the bag, is it felony? Cutler said yes; for so long as he is in my house, or with me, whatever I have delivered to him is adjudged in my possession. As my butler who has my plate in charge, if he flees with it, it is felony; the same law if he who keeps my horse goes away with it; and the case is, that they are at all times in my possession. But if I deliver a horse to my servant to ride on a journey, and he flees with it, it is not felony, for he comes lawfully by the horse by delivery. And so it is, if I give him a bag to carry to London, or to pay to some one, or to buy something, and he flees with it, it is not felony; for it is out of my possession, and he comes lawfully by it. *Pigot.* — It may well be, for the master in all these cases has a good action against him, *sc.* detinue, or action of account.

REPORTER'S NOTE.

COMMON PLEAS. 1533.

[*Reported Dyer*, 5 *a*.]

YORKE puts this question upon the statute 21 H. VIII. [c. 7.], which is "that if any master or mistress deliver any goods to his servant to keep, who withdraws himself, and goes away with the goods to the intent to steal them, or if he embezzle the goods of his master, or convert them to his own use, if the goods be worth forty shillings, it shall be felony."[1] And a man delivers a bond to his servant to receive £20 of the obligor, and the servant receives them, and after that goes away, or converts them to his own use, whether this be within the meaning of the statute or not? And by the better opinion it is not, for he did not deliver to him any goods; for a bond is not a thing in value, but a *chose in action*. And ENGLEFIELDE, J., said that if a man deliver to his apprentice wares or merchandises to sell at a market or fair, and he sell them, and receive money for them, and go away, that is not within the statute; for he had not it by the delivery of his master, nor goes off with the things delivered to him. *Quære.* For the money was not delivered to the servant by the hands of his master, but of the obligor. But if one of my servants deliver to another of my servants my goods, and he go off with them, that is felony; for it shall be said my delivery. And FITZHERBERT, J., said that in the case of a bond, by gift of *omnia bona et catalla*, bonds pass.[2]

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[1] The preamble to this act concludes, "which misbehavior so done was doubtful in the common law whether it were felony or not, and by reason thereof the foresaid servants have been in great boldness to commit such or like offences." By Sect. 2 it is provided that the act shall not apply to an apprentice, or to a servant under the age of eighteen. — ED.

BAZELEY'S CASE.

CROWN CASE RESERVED. 1799.

[*Reported Leach, 4th ed.* 835.]

AT the old Bailey in February Session, 1799, Joseph Bazeley was tried before John Silvester, Esq., Common Serjeant of the city of London, for feloniously stealing on the 18th January preceding, a bank-note of the value of one hundred pounds, the property of Peter Esdaile, Sir Benjamin Hammett, William Esdaile, and John Hammett.

The following facts appeared in evidence: The prisoner, Joseph Bazeley, was the principal teller at the house of Messrs. Esdaile's and Hammett's, bankers, in Lombard Street, at the salary of £100 a year, and his duty was to receive and pay money, notes, and bills, at the counter. The manner of conducting the business of this banking-house is as follows: There are four tellers, each of whom has a separate money book, a separate money-drawer, and a separate bag. The prisoner being the chief teller, the total of the receipts and payments of all the other money-books were every evening copied into his, and the total balance, or rest, as it is technically called, struck in his book and the balances of the other money-books paid, by the other tellers, over to him. When any moneys, whether in cash or notes, are brought by customers to the counter to be paid in, the teller who receives it counts it over, then enters the bank-notes or drafts, and afterwards the cash, under the customer's name, in his book; and then, after casting up the total, it is entered in the customer's book. The money is then put into the teller's bag, and the bank-notes or other papers, if any, put into a box which stands on a desk behind the counter, directly before another clerk, who is called the cash book-keeper, who makes an entry of it in the received cash-book in the name of the person who has paid it in, and which he finds written by the receiving teller on the back of the bill or note so placed in the drawer. The prisoner was treasurer to an association called "The Ding Dong Mining Company;" and in the course of the year had many bills drawn on him by the com-

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[1] But see, *contra*, on this last point, Calye's case, 8 Co. 33. — ED.

pany, and many bills drawn on other persons remitted to him by the company. In the month of January, 1799, the prisoner had accepted bills on account of the company, to the amount of £112 4*s.* 1*d* and had in his possession a bill of £166 7*s.* 3*d.* belonging to the company, but which was not due until the 9th February. One of the bills, amounting to £100, which the prisoner had accepted became due on the 18th January. Mr. William Gilbert, a grocer in the Surry-road, Blackfriars, kept his cash at the banking-house of the prosecutors, and on the 18th January, 1799, he sent his servant, George Cock, to pay in £137. This sum consisted of £122 in bank-notes, and the rest in cash. One of these bank-notes was the note which the prisoner was indicted for stealing. The prisoner received this money from George Cock, and after entering the £137 in Mr. Gilbert's bank-book, entered the £15 cash in his own money-book, and put over the £22 in bank-notes into the drawer behind him, keeping back the £100 bank-note, which he put into his pocket, and afterwards paid to a banker's clerk the same day at a clearing-house in Lombard Street, in discharge of the £100 bill which he had accepted on account of the Ding Dong Mining Company. To make the sum in Mr. Gilbert's bank-book, and the sum in the book of the banking-house agree, it appeared that a unit had been added to the entry of £37 to the credit of Mr. Gilbert, in the book of the banking-house, but it did not appear by any direct proof that this alteration had been made by the prisoner; it appeared, however, that he had made a confession, but the confession having been obtained under a promise of favor, it was not given in evidence.

Const and *Jackson,* the prisoner's counsel, submitted to the court that to constitute a larceny, it was necessary, in point of law, that the property should be taken from the possession of the prosecutor, but that it was clear from the evidence in this case that the bank-note charged to have been stolen never was either in the actual or the constructive possession of Esdaile and Hammett, and that even if it had been in their possession, yet that from the manner in which it had been secreted by the prisoner, it amounted only to a breach of trust.

The court left the facts of the case to the consideration of the jury, and on their finding the prisoner guilty, the case was reserved for the opinion of the twelve judges on a question whether, under the circumstances above stated, the taking of the bank-note was in law a felonious taking, or only a fraudulent breach of trust.

The case was accordingly argued before nine of the judges in the Exchequer Chamber, on Saturday, 27th April, 1799, by *Const* for the prisoner, and by *Fielding* for the Crown.

Const, for the prisoner, after remarking that the prosecutor never had actual possession of the bank-note, and defining the several offences of larceny, fraud, and breach of trust, viz., that larceny is the taking of valuable property from the possession of another without his consent and against his will; secondly, that fraud consists in obtaining valuable property from the possession of another with his consent and will, by means of some artful device, against the subtilty of which common prudence and caution are not sufficient safeguards; and, thirdly, that breach of trust is the abuse or misusing of that property which the owner has, without any fraudulent seducement, and with his own free will and consent, put, or permitted to be put, either for particular or general purposes, into the possession of the trustee, — proceeded to argue the case upon the following points: —

First, That the prosecutors cannot, in contemplation of law, be said to have had a constructive possession of this bank-note, at the time the prisoner is charged with having tortiously converted it to his own use.

Secondly, That, supposing the prosecutors to have had the possession of this note, the prisoner, under the circumstances of this case, cannot be said to have tortiously taken it from that possession with a felonious intention to steal it.

Thirdly, That the relative situation of the prosecutors and the prisoner makes this transaction merely a breach of trust; and,

Fourthly, That this is not one of those breaches of trust which the Legislature has declared to be felony.

The first point, viz., that the prosecutor cannot, in contemplation of law, be said to have had a constructive possession of this bank-note at the time the prisoner is charged with having tortiously converted it to his own use. To constitute the crime of larceny, the property must be taken from the possession of the owner; this possession must be either actual or constructive. It is clear that the prosecutors had not, upon the present occasion, the actual possession of the bank-note, and therefore the inquiry must be, whether they had the constructive possession of it; or, in other words, whether the possession of the servant was, under the circumstances of this case, the possession of the master. Property in possession is said by Sir William Blackstone to subsist only where a man hath both the right to, and also the occupation of, the property. The prosecutors in the present case had only a right or title to possess the note, and not the absolute or even qualified possession of it. It was never in their custody or under their control. There is no difference whatever as to the question of possession between real and personal property; and if, after the death of an ancestor, and before the entry of his heir upon the descending estate, or if, after the death of a particular tenant, and before the entry of the remainder-man, or reversioner, a stranger should take possesion of the vacant land, the heir in the one case, and the remainder-man or reversioner in the other, would be like the prosecutor in the present case, only entitled to, but not possessed of, the estate; and each of them must recover possession of it by the respective remedies which the law has in such cases made and provided. Suppose the prisoner had not parted with the note, but had merely kept it in his own custody, and refused on any pretence whatever to deliver it over to his employers, they could only have recovered it by means of an action of trover or detinue, the first of which presupposes the person against whom it is brought to have obtained possession of the property by lawful means, as by delivery or finding; and the second, that the right of property only, and not the possession of it, either really or constructively, is in the person bringing it. The prisoner received this note by the permission and consent of the prosecutors, while it was passing from the possession of Mr. Gilbert to the possession of Messrs. Esdaile's and Hammett's; and not having reached its destined goal, but having been thus intercepted in its transitory state, it is clear that it never came to the possession of the prosecutors. It was delivered into the possession of the prisoner, upon an implied confidence on the part of the prosecutors that he would deliver it over into their possession, but which, from the pressure of temporary circumstances, he neglected to do. At the time, therefore, of the supposed conversion of this note, it was in the legal possession of the prisoner. To divest the prisoner of this possession, it certainly was not necessary that he should have delivered this note into the hands of the prosecutors, or of any other of their servants personally; for if he had deposited it in the drawer kept for the reception of this species of property, it would have been a delivery of it into the possession of his masters; but he made no such deposit, and instead of determining in any way his own possession of it, he conveyed it immediately from the hand of Mr. Gilbert's clerk into his own pocket. Authorities are not wanting to support this position. In the Year-book, 7 Hen. 6 fol. 43, it is said, "If a man deliver goods to another to keep, or lend goods to another, the deliverer or lender may commit felony of them himself, for he hath but *jus proprietatis;* the *jus possessionis* being with the bailee;" and permitting one man to receive goods to the use of another, who never had any possession of them, is a stronger case. So long ago as the year 1687, the following case was solemnly determined in the Court of King's Bench on a special verdict: The prisoner had been a servant, or journeyman, to one John Fuller, and was employed to sell goods and receive money for his master's use; in the course of his trade he sold a large parcel of goods; received one hundred and sixty guineas for them from the purchaser; deposited ten of them in a private place in the chamber where he slept; and, on his being discharged from his service, took away with him the remaining one hundred and fifty guineas; but he had not put any of the money into his master's till, or in any way given it into his possession. Before this embezzlement was discovered he suddenly decamped from his master's service, leaving his trunk, containing some of his clothes and the ten guineas so secreted behind him; but he afterwards, in the night-time, broke open his master's house, and took away with him the ten guineas which he had hid privately in his bed-chamber; and this was held to be no burglary, because the taking of the money was no felony: for although it was the master's money in right, it was the servant's money in possession, and the first original act no felony. This case was cited by Sir B. Shower, in his argument in the case of

Rex *v.* Meers, and is said to be reported by Gouldsborough, 186; but I have been favored with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. Reynolds, Clerk of the Arraigns, at the Old Bailey, under the title of Rex *v.* Dingley, by which it appears that the special verdict was found at the Easter Session, 1687, and argued in the King's Bench in Hilary Term, 3 Jac. II., and in which it is said to have been determined that this offence was not burglary, but trespass only. The law of this case has been recently confirmed by the case of the King *v.* Bull. The prisoner, Thomas Bull, was tried at the Old Bailey, January Session, 1797, before Mr. Justice Heath, on an indictment charging him with having stolen, on the 7th of the same month, a half-crown and three shillings, the property of William Tilt, who was a confectioner, in Cheapside, with whom the prisoner lived as a journeyman; and Mr. Tilt having had, for some time before, strong suspicion that the prisoner had robbed him, adopted the following method for the purpose of detecting him: On the 7th January, the day laid in the indictment, he left only four sixpences in the till; and taking two half-crowns, thirteen shillings, and two sixpences, went to the house of Mr. Garner, a watchmaker, who marked the two half-crowns, several of the shillings, and the sixpences, with a tool used in his line of business, that impressed a figure something like a half-moon. Mr. Tilt, having got the money thus marked, went with it to the house of a Mrs. Hill; and giving a half-crown and three of the shillings to Ann Wilson, one of her servants, and five of the shillings and the other sixpence to Mary Bushman, another of her servants, desired them to proceed to his house, and purchase some of his goods of the prisoner, whom he had left in care of the shop. The two women went accordingly to Mr. Tilt's shop, where Ann Wilson purchased confectionary of the prisoner to the amount of five shillings and three-pence, gave him the half-crown and three shillings, and received three-pence in change; and Mary Bushman purchased of him articles to the amount of four shillings and sixpence, for which she paid him out of the moneys she had so received, and returned the other shilling to her mistress, Mary Hill: but neither of these women observed whether the prisoner put either the whole or any part of the money into the till or into his pocket. While the women, however, were purchasing these things Mr. Tilt and Mr. Garner were waiting, with a constable, at a convenient distance, on the outside of the shop-door; and when they observed the women come out, they went immediately into the shop, where, on examining the prisoner's pockets, they found among the silver coin, amounting to fifty-three shillings, which he had in his waistcoat pocket, the marked half-crowns, and three of the marked shillings, which had been given to Wilson and Bushman; only seven shillings and sixpence were found in the till; and it appeared that Mrs. Tilt had taken one shilling in the shop and put it into the till during her husband's absence; so that the two shillings which had been left therein in the morning, the one shilling which Mrs. Tilt had put into it, the four shillings and sixpence laid out by Mary Bushman, and the five shillings and sixpence marked money which was found in the prisoner's pocket, made up the sum which ought to have been put into the till. The prisoner upon this evidence was found guilty, and received sentence of transportation; but a case was reserved for the opinion of the twelve judges, Whether, as Mr. Tilt had divested himself of this money by giving it to Mary Hill, who had given it to her servants in the manner and for the purpose above described, and as it did not appear that the prisoner had on receiving it from them, put it into the till, or done anything with it that could be construed a restoring of it to the possession of his master, the converting of it to his own use by putting it into his pocket could amount to the crime of larceny, it being essential to the commission of that offence that the goods should be taken from the possession of the owner; and, although no opinion was ever publicly delivered upon this case, the prisoner was discharged. After these determinations, it cannot be contended that the possession of the servant is the possession of the master; for, independently of these authorities, the rule that the possession of the servant is the possession of the master cannot be extended to a case in which the property never was in the master's possession, however it may be so construed in cases where the identical thing stolen is delivered by the master, or where the question is between the master and a third person. "If," says Sir Matthew Hale, "I deliver my servant a bond to receive money, or deliver goods to him to sell, and he receives the money upon the bond or goods and go away with it, this is not felony; for though the bond or goods were delivered to him by the master, yet the money was not delivered to him by the master." But he admits, that "if taken away from the servant by a trespasser, the master may have a general action of trespass;" which shows that the law, in a criminal case, will not, under such circumstances, consider the master to have a constructive possession of the property. Such a possession arises by mere implication of law; and it is an established rule that no man's life shall be endangered by any intendment or implication whatsoever.[1]

The judges, it is said, were of opinion upon the authority of Rex *v.* Waite, that this bank-note never was in the legal custody or possession of the prosecutors, Messrs. Esdaile and Hammett; but no opinion was ever publicly delivered; and the prisoner was included in the Secretary of State's letter as a proper object for a pardon.[2]

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[1] The argument for the prisoner upon the other points, and that for the Crown are omitted.

[2] On consultation among the judges, some doubt was at first entertained; but at last all assembled agreed that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner: though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. (*Vide* Chipchase's case, Leach, 699.) And they thought that this was not to be differed from the cases of Rex *v.* Waite, Leach, 28, and Rex *v.* Bull, Leach, 841, which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner; and here it was delivered into the possession of the

REGINA *v.* ROBINS.

CROWN CASE RESERVED. 1854.

[*Reported Dearsly C. C.* 418.]

THE following case was reserved for the opinion of the Court of Criminal Appeal, by W. H. Bodkin, Esq., sitting for the Assistant Judge of the Middlesex Sessions.

John Robins was tried at the Middlesex Sessions, in September, 1854, upon an indictment which charged him with stealing five quarters of wheat, the property of his masters, George Swaine and another.

The wheat in question was not the property of the prosecutors, but part of a large quantity consigned to their care and deposited at one of their storehouses. This storehouse was in the care of Thomas Eastwick, a servant of the prosecutors, who had authority to deliver the wheat only on the orders of the prosecutors, or of a person named Callow, who was their managing clerk.

It was proved that on the 24th of June the prisoner, who was a servant of the prosecutors at another storehouse, came to the storehouse in question accompanied by a man with a horse and cart, and obtained the key of the storehouse from Eastwick by representing that he, the prisoner, had been sent by the managing clerk Callow for five quarters of wheat, which he was to carry to the Brighton Railway. Eastwick, knowing the prisoner and believing his statement, allowed the wheat to be removed, the prisoner assisting to put it into the cart, in which it was conveyed from the prosecutors' premises, the prisoner going with it. It was also proved that Callow had given no such authority, the prisoner's statement being entirely false, and that the wheat was not taken to the Brighton Railway, but disposed of, with the privity of the prisoner, by other parties who had been associated with him in the commission of the offence.

The counsel for the prisoner contended that the wheat was obtained by false pretences, but the jury were directed, if they believed the facts, that the offence amounted to larceny, and they found the prisoner guilty of that offence. The prisoner was sentenced to twelve months' imprisonment, and is now confined in the House of Correction at Coldbath Fields in execution of that sentence. I have to ask this Honorable Court, whether the verdict was right in point of law.

This case was argued on the 11th of November, 1854, before Jervis, C. J., Alderson, B., Coleridge, J., Martin, B., and Crowder, J.

Metcalfe, for the prisoner. In this case the prisoner obtained the wheat by means of a false pretence, and was not guilty of larceny. The general rule is, that in larceny the property is not parted with, and in false pretences it is. Here the prosecutor parted with the property in the wheat.

ALDERSON, B. It was delivered to the prisoner for a special purpose, namely, to be taken to the Brighton Railway.

JERVIS, C. J. He gets the key by a false pretence, and commits a larceny of the wheat.

Metcalfe. Eastwick had the sole charge of the wheat; and although it was not delivered to the prisoner by the hand of the master, the delivery by Eastwick must be taken to be a delivery by the master. The decision in Regina *v.* Barnes, 2 Den. C. C. 59, is in favor of this proposition. There the chief clerk of the prisoner's master, on the production by the prisoner of a ticket containing a statement of a purchase which, if it had been made, would have entitled the prisoner to receive 2*s.* 3*d.*, but which purchase had not in fact been made, paid the prisoner the 2*s.* 3*d.*, and it was held that the prisoner was not indictable for larceny, but for obtaining money under false pretences.

ALDERSON, B. That is simply the case of one servant being induced to give the property of the master to another servant by means of a false pretence; but here the property remained in Swaine throughout as bailee. Suppose the prisoner had been really sent by Callow and had not been guilty of any fraud, but on his way to the railway had been robbed of the wheat, could not the wheat have been laid in Swaine?

Metcalfe. Swaine was the bailee of the consignor; he had only a special property, and that special property he parted with to the prisoner.

MARTIN, B. For the purposes of this case Swaine was the owner of the wheat.

ALDERSON, B. If the prisoner had told the truth, and, having obtained the wheat without making any false pretence, had subsequently dealt with it as he has done, he would without doubt be guilty of larceny; and can it be said that he is not guilty of larceny simply because he told a falsehood?

Sleigh, for the Crown, was not called upon.

Conviction affirmed.[1]

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[1] *Acc.* Reg. *v.* Webb, 5 Cox C. C. 154; State *v.* McCartey, 17 Minn. 76. See Rex *v.* Jackson, 1 Moo. C. C. 119. — ED.

REX *v.* BASS.

CROWN CASE RESERVED. 1782.

[*Reported Leach, 4th ed.,* 251.]

AT the Old Bailey, in May Session, 1782, William Bass was convicted of stealing a quantity of goods, the property of John Gatfee.

The prisoner was servant and porter in the general employ of the prosecutor, a gauze weaver in Bishopsgate Street. On the day laid in the indictment he was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men, who invited him into a public house to drink with them, and then persuaded him to open the package and sell the goods to a person whom one of the men brought in, which he accordingly did, by taking them out of the package and putting them into the man's bag; and he received eight guineas of the produce to his own use.[1]

It was referred to the consideration of the twelve judges, whether from the above facts, the prisoner was guilty of a felonious taking.

Mr. BARON HOTHAM, in December Session, 1782, delivered it as the unanimous opinion of all the judges, that the conviction was proper; for the prisoner standing in the relation of a servant, the possession of the goods must be considered as remaining in the master until and at the time of the unlawful conversion of them by the prisoner. The master was to receive the money for them from the customer, and he could at any time have countermanded the delivery of them. The prisoner, therefore, by breaking open the package, tortiously took them from the possession of the owner, and having by the sale converted them *animo furandi* to his own use, the taking is felonious.

Many cases of this kind have occurred, and all of them have been determined to be felony. Guilty of larceny

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prisoner. That although to many purposes the note was in the actual possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached; for it was a lawful one. EYRE, C. J., also observed that the cases ran into one another very much, and were hardly to be distinguished; that in the case of Rex *v.* Spears, Leach, 825, the corn was in the possession of the master under the care of the servant: and LORD KENYON said that he relied much on the Act of Parliament respecting the Bank not going further than to protect the Bank. 2 East, C. L. 574. — REP.

[1] "It was further mentioned as an additional circumstance, that the goods were taken out of the package in which they had been delivered to the prisoner, and put into a bag at the public house." 2 East P. C. 566. — ED.

REX *v.* WATSON.

Crown Case Reserved. 1788.

[*Reported* 2 *East P. C.* 562.]

William Watson was tried on an indictment containing three counts: the first stating, that the prisoner, as a servant, received £3 18*s.*, the money of E. Cowper, his late master, which was delivered to him safely to keep to the use of his said master; and that afterwards the said prisoner withdrew himself from his master with the money, with an intent to steal the same, and to defraud his said master thereof. The second count stated that the prisoner, having received the said money in the manner above stated, and being with his master, had converted the same to his own use; and both concluded against the form of the statute. The third count was for larceny generally. It appeared that Cowper, who was a surrogate, had sent the prisoner, who was his servant, to buy some blank licenses, and had delivered him the £3 18*s.* for that purpose; but the prisoner ran away with the money, and being convicted, a question was reserved for the opinion of the judges, whether the evidence supported any of the counts. And in Easter Term, 1788, all the judges but the Chief Baron held that this case was not within the statute, for to *keep* means to keep for the use of the master, and to return to him. As to the count for larceny, all the judges held this could not be felony at common law; for to make it felony there must be some act done by the prisoner, a fraudulent obtaining of the possession, with intent to steal.

REX *v.* LAVENDER.

Crown Case Reserved. 1793.

[*Reported* 2 *East P. C.* 566.]

John Lavender was indicted for larceny at common law of a certain sum of money belonging to John Edmonds. The prisoner was a servant to Edmonds, who had delivered him the money in question to carry to the house of one Thomas Flawn, and there to leave the same with him, he having agreed to give Edmonds bills for the money in a few days. The prisoner did not carry the money to Flawn as directed, but went away with it, purchased a watch and other things with part, and part remained in his possession when he was apprehended. Being found guilty, sentence was respited for the opinion of the judges, whether this were a felony or a breach of trust; and in Easter Term, 1793, all the judges held this was a felony, and that the last point in Watson's case above referred to was not law. In Trinity Term following this case was again under the consideration of the judges, when they adhered to their former opinion, and some said that the distinction between this case and Watson's, if there were any, was, that in Watson's case the money was not delivered to the prisoner to be paid specifically to any other person; but if the prisoner had laid out his own money to the same amount in buying licenses, it would have been a compliance with the order. He was commissioned to merchandise with the money. But they admitted that the distinction, if any, was extremely nice, and BULLER, J., thought there was none, and recognized the case of R. *v.* Paradice, before Gould, J., as good law.[1]

REGINA *v.* TOLLETT AND TAYLOR.

OXFORD ASSIZES. 1841.

[*Reported Carrington & Marshman*, 112.]

COLERIDGE, J.[2] (in summing up). There is no doubt that the property found in the possession of the prisoner at Abingdon was the property of the prosecutor Henry Eltham, and that it was taken from his house on the night of Saturday, the 31st of October, and that it was found at Abingdon in the same state in which it was taken; and it seems also to be clear that neither of the prisoners was in possession of the keys which unlocked the boxes. With respect to the prisoner Tollett, I think that the evidence is insufficient to affect him as a principal. The evidence, as it affects the other prisoner, is therefore that which you will principally have to attend to. It is proved by the prosecutor, that he and his wife had been upon bad terms, and that she had threatened to leave him and go to service; and the wife herself says that she twice met the prisoner Taylor at Mrs. Hayward's, which she does not know to be a house of ill fame, and there arranged with the prisoner Taylor that she should elope with him, and that they should live at Gloucester as man and wife. She says that on these two occasions she was with the prisoner in a bedroom for half an hour each time, but that nothing improper passed between them; she also says that the prisoner Taylor desired her to bring all the money she could, and that she was to get the money and the boxes ready on the Saturday night, and he would come for them and take her away with him also. She further states that she sat up after her husband had gone to bed, in expectation of his coming; that he did come, and that she took him into the room in which her husband was asleep, and that he took the boxes away in the cart of the other prisoner, Tollett, and that if her husband had remained asleep she would have gone off with the prisoner Taylor; but as her husband awoke she was obliged to stay, and she gave information which led to the apprehension of the prisoners at Abingdon. Now, by law there is such a unity of interest between husband and wife, that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery of them by the wife. If, therefore, the prisoner Taylor had been an indifferent person, and the wife of the prosecutor had delivered this money and these goods to him to convert to his own use, that would in point of law have been no larceny.[1] But if the person to whom the goods are delivered by the wife be an adulterer, it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods, though they be delivered to him by the wife. On this evidence, it does not appear that the criminal purpose had been carried into effect; but if that criminal purpose had not been completed, and these goods were removed by the wife and the prisoner Taylor with an intent that she should elope with him and live in adultery with him, I shall direct you in point of law that the taking of them was a larceny. Mr. Carrington has said that if the wife eloped with an adulterer, it would be no larceny in the adulterer to assist in carrying away her clothes. I do not agree with him, for I think that if she elopes with an adulterer, who takes her clothes with them it is larceny to steal her clothes, which are her husband's property, just as much as it would be a larceny to steal her husband's wearing apparel, or anything else that was his property. However, the evidence in this case goes further than that; for it is proved that the prisoner told her to bring with her all the money that she could, and a sum of money is contained in one of the boxes. Mr. Carrington also contends that, except on the evidence of the wife, there is no proof that the prisoner Taylor was anything more than a friend; and if there was a larceny in the stealing of these goods, the wife is an accomplice, and requires confirmation. Taking that to be so, we find that she is confirmed as to all the main facts of the case; and she certainly appears to have no motive to blacken her own character; and it seems reasonable, therefore, to believe her as to the criminal intention on her part. Mr. Carrington also says that the conduct of the two prisoners was not that of thieves, as they stayed at Abingdon, where they were known; and that certainly ought to weigh in favor of the prisoners. It is also said that they did not break bulk; but I think that that does not amount to much, because, if the scheme was for the wife of the prosecutor to live with the prisoner Taylor at Gloucester, there would be no object in opening the boxes at Abingdon. It is further said that Taylor did not know what was in the boxes. However, if a man take away any property at all belonging to another, having arranged to elope with the wife of that other, and having told the wife to bring all the money she could, it will be for you to say whether he did not intend to steal the property thus taken away, though he might not at the time of the taking know exactly of what the property consisted. If you are satisfied that the prisoner Taylor took any of the husband's property, there then being a criminal intention, or there having been a criminal act between that prisoner and the wife, it is a larceny, and you ought to find the prisoner guilty; but if you think that the prisoner took away the boxes merely to get the wife away as a friend only, and without any reference to any criminal connection between the prisoner and the wife, either actual or intended, you ought to acquit him.

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[1] *Acc.* State *v.* Schingen, 20 Wis. 74. — ED.

[2] The charge only is given; it sufficiently states the case.

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[1] *Acc.* Lamphier *v.* State, 70 Ind. 317, *semble.* — ED.

The jury found the prisoner Taylor guilty, and the prisoner Tollett not guilty.[1]

REGINA v. NORVAL.

CENTRAL CRIMINAL COURT. 1844.

[*Reported* 1 *Cox C. C.* 95.]

THE prisoners were indicted for feloniously stealing certain deer-horns, the property of one Kirkman.

It appeared in evidence that the prisoner Norval was in the employ of Kirkman, who was a carman. The goods in question were lying in the docks, and the owner delivered to Kirkman the dock warrants, in order that he might receive them and cart them up to town. Kirkman accordingly gave the warrants to the prisoner Norval, with the necessary instructions, and he (Norval) went with a cart to the docks, the deer-horns were put into it, and on the passage back to London several of them were abstracted, Norval colluding with the other prisoner for that purpose.

Ballantine, for the prisoner Norval, contended, that upon this state of facts the charge should have been one of embezzlement as against him, and not one of felony. The goods had never been in the master's possession. The prisoner obtained them lawfully in the first instance, so that there could be no tortious taking, which was an essential ingredient in the proof of felony.

Mr. Commissioner BULLOCK consented to reserve the point, and the prisoner was convicted.

The learned commissioner subsequently stated that he had consulted Mr. Baron GURNEY on the subject, who was of opinion that the conviction was proper. True it is that the making away by a servant with goods that have never been in the possession of the master, is embezzlement; but here there is a constructive possession, and that accrued at the moment when the goods were placed in the master's cart.

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[1] *Acc.* Rex *v.* Willis, 1 Moody C. C. 375; Reg. *v.* Glassie, 7 Cox C. C. 1; Reg. *v* Kenny, 13 Cox C. C. 397; People *v.* Schuyler, 6 Cow. 572. — ED.

[illegible]

REGINA *v.* REED.

Crown Case Reserved. 1853.

[*Reported* 6 *Cox C. C.* 284.]

The following case was reserved by the Court of Quarter Sessions for the county of Kent.

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on the 4th January, 1853, before Aretus Akers, Edward Burton, and James Espinasse, Esqrs., justices appointed to try prisoners in a separate court, Abraham Reed was tried upon an idictment for feloniously stealing 200 lbs. weight of coals, the property of William Newton, his master, on the 6th December, 1852; and James Peerless was charged in the same indictment with receiving the coals, knowing the same to have been stolen, and was acquitted.

The evidence of the prosecutor, William Newton, was as follows: — "I am a grocer and miller, at Cowden, and sell coals by retail. The prisoner, Reed, entered my service last year, about three weeks before the 6th December. On that day I gave him directions to go to a customer to take some flour, and thence to the station at Edenbridge, for 12cwt. of coals. I deal with the Medway Company, who have a wharf there, Holman being wharfinger. I told Reed to bring the coals to my house. Peerless lives about 500 yards out of the road from the station to my house. Reed went about nine A.M., and ought to have come back between three and four P.M.; but as he had not come back, I went in search of him at half-past six, and found him at Peerless's. The cart was standing in the road opposite the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked Reed what business he had there; he said, 'to deliver half a hundredweight for which he had received an order from Peerless.' Reed had never before told me of such an order, and had no authority from me to sell coals. Later that evening I went and asked Peerless what coals he had received from my cart; he said, half a hundredweight. I then asked him how they were carried from the cart; he said, in a sack. I weighed the coals when brought home, and found the quantity so brought a quarter of a hundredweight and four pounds short. I went to Peerless's next day and found some coals there, apparently from half to three quarters of a hundredweight." Upon his cross-examination he stated as follows: "I believe Peerless had sometimes had coals from me. When I came up they were shutting the tail of the cart, but some coals were in a truck-basket at their feet. Reed said at once that he had received an order from Peerless. It was two hours later when I asked Peerless, and when he said he had ordered them. Reed said he had carried two hundredweight in, but that was two hours after." On his re-examination he said: "I think Peerless had had some coals from me about a fortnight before the 6th." James

Holman, another witness for the prosecution, said: "I am wharfinger to the Medway Company, at the Edenbridge station, and Newton deals there for coals. Reed came on the 6th December, and asked for half a ton for Newton, and I supplied him. I entered them at the time to Newton, and now produce the book with the entry." James Handley, another witness for the prosecution, said, "I am superintendent of the Sevenoaks division. On the 7th December, I went to Peerless's, and asked him how much coals he had received from Reed; he said he had ordered half a hundredweight three weeks before; Reed, when I asked him afterwards, said, three days before; Reed said he had received two glasses of wine from Peerless." On his cross-examination, he said, "This was about four P. M., 7th December." Newton was then re-examined and said: "Reed came to me in the morning of the 7th; I told him 2¾ cwts. were missing. He then said one sack had been left at the wharf by mistake; I therefore charged him with only three-quarters of a hundredweight." Holman, upon re-examination, said: "Reed left a sack behind him; but it was an empty one." This being the case for the prosecution, Mr. Ribton, counsel for the prisoner, submitted that there was no case to go to the jury on the charge of larceny, inasmuch as the coals left at Peerless's had never been in the possession of Newton, the master. Mr. Rose, counsel on the part of the prosecution, contended that the coals were constructively in the possession of Newton, and that the offence was properly charged as larceny; but that, under the provisions of the act 14 & 15 Vict. c. 100, s. 13, it was immaterial whether the offence were larceny or embezzlement, as the jury might find a verdict either for larceny or embezzlement. Mr. Ribton then proposed that it should be left to the jury as a charge of embezzlement; but to this Mr. Rose objected, on the ground that the receiver must then be acquitted. The court were of opinion that there was a constructive possession in the master, and left the case to the jury as a case of larceny upon the evidence, who thereupon found the prisoner, Abraham Reed, guilty. Mr. Ribton then applied to the court to submit the case to the Court of Criminal Appeal, contending that the conviction was wrong in law; as, if any offence had been committed, it was embezzlement, and not larceny. The court acceded to the application, and respited judgment, and discharged Reed, upon his entering into recognizances — himself in £20, and one surety in £20 — to receive judgment at the next Court of Quarter Sessions for Kent.

This case was first argued on the 23d April, 1853, before Jervis, C. J., Parke, B., Alderson, B., Wightman, J., and Cresswell, J., when the court took time to consider their judgment. The court afterwards directed that the case should be argued before all the judges; and, in pursuance of that direction, the case was again heard on the 19th November, 1853.

Ribton, for the prisoners. The conviction is wrong. To constitute larceny there must, according to all the definitions of that offence, be a taking from the possession of the owner. Formerly, it was supposed that the taking must be out of the actual possession of the owner, as appears by the recital of the earliest Embezzlement Act (21 Hen. VIII. c. 7), which was passed to provide for the punishment of servants converting goods or money entrusted to their keeping by their masters (Dalton's Country Justice, 496); but it is now settled that the possession may be either actual or constructive. In either case the taking constitutes a trespass, which is essential to larceny. Constructive possession is of two kinds: first, where property has been given by the master to the servant for a special purpose, or is put under the servant's charge or custody; secondly, where a third person has given goods to the servant, and the servant has determined his own exclusive possession by some act which vests the possession in the master. The constructive possession in this case, if any, was of the second kind; but there was, in truth, no possession by the master at all.

PARKE, B. If the goods were the property of the master before the delivery of them to the servant, any act whereby they are reduced into the master's possession is sufficient.

Ribton. Yes; but not a mere right to the actual possession. The criterion is, whether the goods have reached the place of their ultimate destination? The distinction is between the actual possession and the right to the actual possession. In Waite's case (1 Leach, 28; 2 East P. C. 570), a cashier of the Bank of England abstracted an India bond; but, as the bond had not been previously placed by him in the cellar of the bank, the place of its ultimate destination, the act was held to be not one of larceny. So, in the present case, the act is not one of larceny, because the coals, though the master had a right to the possession of them, had not reached the place of their final deposit. In R. *v.* Bazeley (2 Leach, 835; 2 East P. C. 571), money was received by a banker's clerk at the counter, and, instead of putting it into the proper drawer, he purloined it; and that was held not to be larceny, because as against him there was no possession by the master. [LORD CAMPBELL, C. J. — On the former argument, my brother Parke suggested that that was money, the subject of account. PLATT, B. — Suppose it to be the duty of the clerk to put the money into a drawer and lock it up, must the drawer be pushed home and locked up before the money has got into the possession of the master?] The drawer on the premises of the master is the ultimate place of deposit. [LORD CAMPBELL, C. J. — Suppose that the servant leaves the horse and cart on the road; has he then determined his duty, so that if he comes back he may steal them?] If he had, it would be embezzlement. R. *v.* Bull, 2 Leach, 841; R. *v.* Foorer, cited in R. *v.* Meeres, 1 Show. 50; R. *v.* Walsh, 4 Taunt. 258, 276; R. & R. 215; 2 East P. C. 177; and R. *v.* Spears there cited. [LORD CAMPBELL, C. J. — In the report in 4 Taunt. 276, Heath, J., says, "That case went upon the ground that the corn was in the prosecutor's barges, which was the same thing as if it had been in his granary."] The report in East is not so. He also cited R. *v.* Sullens, 1 Moo. C. C. 129, and R. *v.* Masters, 3 Cox Crim. Cas. 178;

1 Den. 332. [POLLOCK, C. B. — Suppose he had had to take the coals to a customer at once. How would it be then? In respect to the master, the cart would be the final place of deposit.] The customer's house would have been the final place of deposit. [LORD CAMPBELL, C. J. — How do you define the place of final deposit?] That depends on the particular circumstances of each case. In this one, for instance, it is the house of the master. [LORD CAMPBELL, C. J. — When the coals passed the threshold, or the cart passed the gate? A farm-house is at the extremity of a field; does the constructive possession cease at the gate of the field, or at the door of the house? PLATT, B. — The cart was in the possession of the master. If he had taken that, it would have been larceny. PARKE, B. — The cart is but the means of transit to the master's house, which was the ultimate place of destination.] In R. *v.* Hayward (1 Car. & K. 518) straw thrown down at a stable door was considered to have reached a place of final deposit. If a banker's clerk collects bills, puts them into his pocket, and abstracts one, the property of his master, which he afterwards converts to his own use, that is embezzlement, not larceny. [JERVIS, C. J. — How do you distinguish the cases of R. *v.* Spears and R. *v.* Abrahat (2 Leach, 828)? LORD CAMPBELL, C. J. — R. *v.* Spears is on all-fours with this case. PARKE, B. — In R. *v.* Spears it is uncertain, looking at the reports in East and Leach, and the difference between the two editions of Leach, whether the judgment did not turn on the fact that the master had bought the whole cargo.] In that case the master would have had a title and constructive possession before delivery to the prisoner.

Rose, contra. The act of the prisoner was an offence at common law. The embezzlement statutes are affirmative, and, so soon as a trespass is proved, a larceny is established. There was a trespass in this case; for, as the coals were asked for in the master's name, charged to the master in the bill, put into the master's sacks, and the sacks put into the master's cart, the master had constructive possession before the servant had actual exclusive possession. Com. Dig. "Trespass," B. 4. [LORD CAMPBELL, C. J. — The constructive possession of the master need not be distinct from the actual possession of the servant.] What act before the taking in this case divested the master of his constructive possession? Robinson's case (2 East P. C. 565), Paradice's case (ib.), proceed on the principle that, despite the manual possession of the servant, the constructive possession is in the master. So, if the servant had left the cart and coals, had returned suddenly in the night, and had taken the coals, would he not have been guilty of stealing his master's property? The case of R. *v.* Spears is not to be distinguished from this. In commenting on Waite's case and Bazeley's case, East reconciles them by saying that there is no constructive possession without the possession of the servant. In R. *v.* Bull the case was one of money, which constitutes matter of account, and trespass would not lie. Higgs *v.* Holliday, Cro. Eliz. 746. This is not like the case of a gift to the master, where he never gets possession until delivery to the servant. [LORD CAMPBELL, C. J. — Spears' case is to be taken from the second edition of Leach, as is shown by Heath, J., in 4 Taunt. 276. PARKE, B. — If we take it from Abrahat's case, the corn was clearly purchased by the master before.] Suppose that another servant had been sent; that he had delivered the order; that the coals had been weighed out; and that the prisoner had then been sent with the cart for the coals, and had stolen some of them, — that must have been larceny. In R. *v.* Harding (R. & R. 125) property which the prosecutor had bought was weighed out in the presence of his clerk, and delivered to the carter's servant to cart, and a fraudulent conversion by the carman was held larceny.

Ribton, in reply. In R. *v.* Harding the property had been in the actual possession of the master. In R. *v.* Watts (2 Den. C. C. 14), the defendant divested himself of possession in favor, so to say, of his employers. In this case the prisoner has not so divested himself by any distinct act. In R. *v* Watts, the distinct act was the receipt had of the cheque by the prisoner; it being his duty to his employers to receive it. In this case the coals had not reached their final destination. *Cur. adv. vult.*

LORD CAMPBELL, C. J. There lies before me a judgment that I had prepared for myself at a time when there was reason to suppose that there might be one, if not more dissenting judges. I have reason to believe now that there will not be any dissent; but still this judgment must be considered only as embodying the reasons I give for my opinion, because I have no authority to say that my brothers concur in that opinion, and the reasons for it. For convenience, I have written my judgment, and my learned brothers will say how far they concur or dissent. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that, in such a case, the goods must have been in the actual or the constructive possession of the master; and that, if the master had no otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have therefore to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it; and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny. That is expressly determined in Robinson's case (2 East, 565). There seems considerable difficulty in contending that, if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his order, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination. But he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion, with the most sincere deference to any of my learned brothers who may at any time have taken a different view, — to this conclusion I should have come on principle; and I think that Spears' case is an express authority for it. The following is an exact copy of the statement of that case, signed by Buller, J., in pp. 181, 182, and 183 of the 2d volume of the Black Book, containing the decisions of the judges in Crown cases, deposited with the Chief Justice of the Queen's Bench for the time being: "John Spears was convicted before me at Kingston, for stealing forty bushels of oats of James Broune & Co. in a barge on the Thames. Broune & Co. sent the prisoner with their barge to Wilson, a corn meter, for as much oats only as the barge would carry, and which were to be brought in loose bulk. The prisoner received from Wilson 220 quarters in loose bulk, and five quarters in sacks; the prisoner ordering that quantity to be put into sacks. The quantity in the sacks was afterwards embezzled by the prisoner; and the question reserved for the opinion of the judges is, whether this was felony, the oats never having been in the possession of the prosecutor; or whether it was not like the case of a servant receiving change or buying a thing for his master, but never delivering it." Then there is a reference made to Dy. 5, and 1 Show. 52; and then this is signed by Sir J. Buller; and then is added, "25th April, 1798. Conviction affirmed." Now that is an exact copy from the Black Book. In that case the question arose whether the corn, while in the prosecutor's barge, in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the possession of the prosecutor; and the judges unanimously held, that from the time of its being put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met at the bar by a suggestion that the whole cargo of corn, of which the quantity put on board this barge was a part, was or might have been purchased by the prosecutor, so that he might have had a title and constructive possession before the delivery to the prisoner. But the very statement of the case in the Black Book, and the authorities referred to, show that the judges turned their attention to the question whether the exclusive possession of the servant had not been determined before conversion; and during the argument of Rex *v.* Walsh (4 Taunt. 276) we have the *ratio decidendi* in Spears' case explicitly stated by one of the judges who concurred in the decision: "Heath, J. — That case went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary." Read "cart" for "barge," "coals" for "corn," and "cellar" for "granary," and the two cases are for this purpose precisely the same. There is no conflicting authority; for in all the cases relied upon by Mr. Ribton, the exclusive personal possession of the prisoner had continued down to the time of the wrongful conversion. It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests on a subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I do not think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner, who stole it, was sufficiently answered by the subtlety that when the prisoner had once parted with the personal possession of it, so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created by common law or by statute, nice distinctions must arise, and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction; for the only objection to it is founded upon an argument that he ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.

Jervis, C. J. I concur in the judgment of the Lord Chief Justice. I had originally written a judgment concurring in the view taken by my lord; but ultimately I have not found it necessary to read it. It is admitted that the cart was in the possession of the servant for a special purpose; if he had taken the cart, he would have been guilty of larceny; and if the cart for this purpose continued the cart of the master, the delivery of the coals into the cart was a delivery to the master, and makes the offence a larceny.

Parke, B. I certainly had differed from the view of this case which has been taken by Lord Campbell at a time when it was uncertain what the case of Spears actually was, and treating this case as *res nova.* The book in which the opinions of the judges are written, and which is always in the custody of the Lord Chief Justice, was mislaid; and the case of John Spears was differently reported in the two editions of Leach, and also in East's Crown Law; and that case could not for a long time be found. However, since it has been found, I have satisfied myself; and I entertain no doubt upon it. I should have delivered my reasons at length; but it is unnecessary now to do so. The cases of Rex *v.* Abrahat and Rex *v.* Spears having been discovered, and having read that case with the explanation of Heath, J., I find the point decided; and though, therefore, if this were *res nova*, I should have pronounced an opinion that this was not larceny, yet as that case is a decided authority, by the authority of that case I am bound; and it is unnecessary for me to deliver my reasons at any greater length.

The other judges concurred. *Conviction affirmed.*

[illegible]

COMMONWEALTH *v.* RYAN.

Supreme Judicial Court of Massachusetts. 1892.

[*Reported* 155 *Massachusetts,* 523.]

Holmes, J.[1] This is a complaint for embezzlement of money. The case for the government is as follows: The defendant was employed by one Sullivan to sell liquor for him in his store. Sullivan sent two detectives to the store, with marked money of Sullivan's, to make a feigned purchase from the defendant. One detective did so. The defendant dropped the money into the money drawer of a cash register, which happened to be open in connection with another sale made and registered by the defendant, but he did not register this sale, as was customary, and afterward — it would seem within a minute or two — he took the money from the drawer. The question presented is whether it appears, as matter of law, that the defendant was not guilty of embezzlement, but was guilty of larceny, if of anything. The defendant asked rulings to that effect on two grounds: first, that after the money was put into the drawer it was in Sullivan's possession, and therefore the removal of it was a trespass and larceny; and secondly, that Sullivan's ownership of the money, in some way not fully explained, prevented the offence from being embezzlement. We will consider these positions successively.

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[1] The opinion only is given; it sufficiently states the case.

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian (Commonwealth *v.* King, 9 Cush. 284); while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny. Commonwealth *v.* Berry, 99 Mass. 428; Commonwealth *v.* Davis, 104 Mass. 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offence. 2 Leach (4th ed.), 843, 848, note; 1 Leach (4th ed.), 35, note; 2 East P. C. 568, 571.

The history of it is this. There was no felony when a man received possession of goods from the owner without violence. Glanv., bk. 10, c. 13; Y. B. 13 Edw. IV. 9, pl. 5; 3 Co. Inst. 107. The early judges did not always distinguish clearly in their language between the delivery of possession to a bailee and the giving of custody to a servant, which indeed later judges sometimes have failed to do. E. g. Littleton in Y. B. 2 Edw. IV. 15, pl. 7; 3 Hen. VII. 12, pl. 9; Ward *v.* Macauley, 4 T. R. 489, 490. When the peculiar law of master and servant was applied either to the master's responsibility or to his possession, the test seems to have been whether or not the servant was under the master's eye, rather than based on the notion of *status* and identity of person, as it was at a later day. See Byington *v.* Simpson, 134 Mass. 169, 170. Within his house a master might be answerable for the torts of his servant, and might have possession of goods in his servant's custody, although he himself had put the goods into the servant's hands; outside the house there was more doubt; as when a master intrusted his horse to his servant to go to market. Y. B. 21 Hen. VII. 14, pl. 21; T. 24 Edw. III.; Bristol in Molloy, De Jure Maritimo, bk. 2, c. 3. § 16; Y. B. 2 Hen. IV. 18, pl. 6; 13 Edw. IV. 10, pl. 5; s. c. Bro. Abr. Corone, pl. 160; Staundforde, I., c. 15, fol. 25; c. 18, fol. 26; 1 Hale, P. C. 505, note. See Heydon & Smith's case, 13 Co. Rep. 67, 69; Drope *v.* Theyar, Popham, 178, 179; Combs *v.* Bradley, 2 Salk. 613; and, further, 42 Ass. pl. 17, fol. 260; 42 Edw. III. 11, pl. 13; Ass. Jerus. (ed. 1690), cc. 205, 217. It was settled by St. 21 Hen. VIII. c. 7, that the conversion of goods delivered to a servant by his master was felony, and this statute has been thought to be only declaratory of the common law in later times, since the distinction between the possession of a bailee and the custody of a servant has been developed more fully, on the ground that the custody of the servant is the possession of the master. 2 East P. C. 564, 565; The King *v.* Wilkins, 1 Leach (4th ed.), 520, 523. See Kelyng, 35; Fitzh. Nat. Brev. 91 E; Blosse's case, Moore, 248; s. c. Owen, 52, and Gouldsb. 72. But probably when the act was passed it confirmed the above mentioned doubt as to the master's possession where the servant was intrusted with property at a distance from his master's house in cases outside the statute, that is, when the chattels were delivered by a third person. In Dyer, *5a*, *5b*, it was said that it was not within the statute if an apprentice ran off with the money received from a third person for his master's goods at a fair, because he had it not by the delivery of his master. This, very likely, was correct, because the statute only dealt with delivery by the master; but the case was taken before long as authority for the broader proposition that the act is not a felony, and the reason was invented to account for it that the servant has possession, because the money is delivered to him. 1 Hale P. C. 667, 668. This phrase about delivery seems to have been used first in an attempt to distinguish between servants and bailees. Y. B. 13 Edw. IV. 10, pl. 5; Moore, 248; but as used here it is a perverted remnant of the old and now exploded notion that a servant away from his master's house always has possession. The old case of the servant converting a horse with which his master had intrusted him to go to market was stated and explained in the same way, on the ground that the horse was delivered to the servant. Crompton, Just. 35*b*, pl. 7. See The King *v.* Bass, 1 Leach (4th ed.), 251. Yet the emptiness of the explanation was shown by the fact that it still was held felony when the master delivered property for service in his own house. Kelyng, 35. The last step was for the principle thus qualified and explained to be applied to a delivery by a third person to a servant in his master's shop, although it is possible at least that the case would have been decided differently in the time of the Year Books (Y. B. 2 Edw. IV. 15 pl. 7; Fitzh. Nat. Brev. 91 E); and although it is questionable whether on sound theory the possession is not as much in the master as if he had delivered the property himself. Rex *v.* Dingley (1687), stated in The King *v.* Bazeley, 2 Leach (4th ed.), 835, 841, and in The King *v.* Meeres, 1 Show. 50, 53; Waite's case (1743), 2 East P. C. 570; s. c. 1 Leach (4th ed.), 28, 35, note; Bull's case, stated in The King *v.* Bazeley, 2 Leach (4th ed.), 835, 841; s. c. 2 East P. C. 571, 572; The King *v.* Bazeley, *ubi supra;* Regina *v.* Masters, 1 Den. C. C. 332; Regina *v.* Reed, Dears. C. C. 257, 261, 262.

The last mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient, to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place. Regina *v.* Reed, Dears. C. C. 257. No doubt a final deposit of money in the till of a shop would have the effect. Waite's case, 2 East P. C. 570, 571; s. c. 1 Leach (4th ed.), 28, 35, note; Bull's case, 2 East P. C. 572; s. c. 2 Leach (4th ed.), 841, 842; The King *v.* Bazeley, 2 East P. C. 571, 574; s. c. 2 Leach (4th ed.), 835, 843, note; Regina *v.* Wright, Dears. & Bell, 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot and has not lost his power over it; as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself. Sloan *v.* Merrill, 135 Mass. 17, 19; Jefferds *v.* Alvard, 151 Mass. 94, 95; Commonwealth *v.* Drew, 153 Mass. 588, 594.

It follows from what we have said that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that, if the defendant before he placed the money in the drawer intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny. The distinction may be arbitrary, but, as it does not affect the defendant otherwise than by giving him an opportunity, whichever offence he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

With regard to the defendant's second position, we see no ground for contending that the detective in his doings was a servant of Sullivan, or that he had not a true possession of the money, if that question were open, which it is not. The only question reserved by the exceptions is whether Sullivan's ownership of the money prevented the defendant's act from being embezzlement. It has been supposed to make a difference if the right of possession in the chattel converted by the servant has vested in the master previous to the delivery to the servant by the third person. 1 Eng. Crim. Law Com'rs Rep. (1834), 31, pl. 4. But this notion, if anything more than a defective statement of the decisions as to delivery into the master's barge or cart (Rex *v.* Walsh, 4 Taunt. 258, 266, and Regina *v.* Reed, *ubi supra*), does not apply to a case like the present, which has been regarded as embezzlement in England for the last hundred years. Bull's case, stated in The King *v.* Bazeley, 2 Leach (4th ed.), 835, 841: s. c. 2 East P. C. 571, 572; The King *v.* Whittingham, 2 Leach (4th ed.), 912; The King *v.* Headge, 2 Leach (4th ed.), 1033; s. c. Russ. & Ry. 160; Regina *v.* Gill, Dears. C. C. 289. If we were to depart from the English decisions, it would not be in the way of introducing further distinctions. See Commonwealth *v.* Bennett, 118 Mass. 443, 454.

Exceptions overruled.

SECTION II. (*continued*).

(c) POSSESSION IN CASE OF FINDING.

REX *v.* MUCKLOW.

CROWN CASE RESERVED. 1827.

[*Reported* 1 *Moody C. C.* 160.]

THE prisoner was tried before Mr. Justice Holroyd, at the Spring assizes for the county of Warwick, in the year 1827, upon an indictment which charged him with stealing a bill of exchange for ten pounds eleven shillings and sixpence, the first count stating it to be the property of John Lea and others, and the second count as the property of one other James Mucklow. There were two other counts stating it to be a warrant for the payment of ten pounds eleven shillings and sixpence, instead of a bill of exchange.

The instrument in question was a draft drawn by John Lea and Sons, on the day it bears date, at Kidderminster (where they carried on business), on their bankers at the same place, and was as follows: —

Kidderminster, Dec. 1. 1826.

Messrs. WAKEMAN and TURNER, Bankers, Kidderminster:

Pay Mr. James Mucklow, or bearer, ten pounds eleven shillings and sixpence.

£10. 11*s.* 6*d.* JOHN LEA and SONS.

This draft was unstamped, and was written on the same sheet of paper with a letter, directed "James Mucklow, Saint Martin's Lane, Birmingham," and was sent by Lea and Sons by the post to Birmingham, which is eighteen miles from Kidderminster.

No person of that name being found or heard of to be living in Saint Martin's Lane, Birmingham, and the prisoner living in a house about a dozen yards from Saint Martin's Lane, with his father, Joseph Mucklow (who was also included in the same indictment, but acquitted), the postman, on the second of the same December, called with the letter at their house when they were out, and left a message that there was a letter for them which they were to send for: and it was in consequence thereof, on the same day, delivered to the father, and afterwards came to the hands of the prisoner his son, who appropriated the draft to his own use, and received payment of it, under circumstances proved by evidence arising from the contents of the letter, and otherwise, that satisfied the jury he knew the letter and draft were not intended for him, but for another person, and upon which they found him guilty of the larceny.

The letter and draft were intended for another Mr. James Mucklow, then of New Hall Street, Birmingham, to whom Messrs. Lea and Sons were then indebted, to the amount of the sum contained in the draft, for goods sold and delivered; but it was misdirected to Saint Martin's Lane by mistake, and sent by the post, in consequence of an application by letter by that James Mucklow to them for payment, as the goods were sold for cash.

It was objected that this could not in law amount to larceny, as the possession of the letter and draft had been voluntarily parted with by Lea and Sons, and also by the postman, and without any fraud on the part of the prisoner; and Story's case, Russ. & Ry. C. C. R. 81, and Walsh's case, ibid. 215, were cited.[1]

The learned judge respited the judgment, to take the opinion of the judges on these points.

At a meeting of the judges in Easter Term, 1827, this conviction was held wrong, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter; and a pardon was recommended.

MERRY *v.* GREEN.

EXCHEQUER. 1841.

[*Reported 7 Meeson & Welsby*, 623.]

TRESPASS for assault and false imprisonment. Pleas: first, not guilty, whereupon issue was joined; secondly, that the plaintiff had feloniously stolen, taken, and carried away a certain purse filled with coin, etc., of the goods and chattels of one Francis Tunnicliffe, wherefor the defendants had given the plaintiff in charge to a peace-officer, and the plaintiff was therefore arrested and detained a reasonable time, which are the alleged trespasses in the declaration mentioned.[2] To this plea the plaintiff replied *de injuria*, whereupon issue was joined.

At the trial before Tindal, C. J., at the last Warwickshire Assizes, the following appeared to be the facts of the case: Messrs Mammatt and Tunnicliffe, who had for some time resided together at Ashby-de-la-Zouch, in the same house, and keeping the same table and servants, in October, 1839, broke up their establishment and sold their furniture (which was partly joint and partly separate property) by public auction. At that sale the plaintiff, who was a shoemaker also residing in Ashby, became the purchaser, at the sum of £1 6*s.*, of an old secretary or bureau, the separate property of Mr. Tunnicliffe. The plaintiff kept the bureau in his house, and on the 18th of November following, he sent for a boy of the name of Garland, a carpenter's apprentice, to do some repairs to the bureau. While Garland was so engaged he remarked to the plaintiff that he thought there were some secret drawers in the bureau, and touching a spring he pulled out a drawer which contained a quantity of writings. The plaintiff then discovered another drawer, in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank-notes. Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came by the possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the property to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants (one of whom was the solicitor of Mr. Tunnicliffe) went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate, on a charge of felony. The plaintiff was ultimately discharged, the magistrate doubting whether a charge of felony could be supported. At the trial, a witness of the name of Hannah Jenkins was called on behalf of the plaintiff, who deposed that she was present at the auction and remembered the piece of furniture in question being put up for sale and bought by the plaintiff; that after it was sold an observation was made by some of the bystanders to the effect that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said, "So much the better for the buyer;" adding, "I have sold it with its contents, and it is his." This statement was opposed by the evidence of the auctioneer, who stated, on cross-examination by the defendant's counsel, that there was one drawer which would not open, and that what he had said was, "That is of no consequence; I have sold the secretary and not its contents." It did not appear that any person knew that the bureau contained anything whatever.

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[1] Two other objections urged by the defendant are omitted.

[2] The substance only of the second plea is stated.

The learned chief justice, in summing up, told the jury that, as the property had been delivered to the plaintiff as the purchaser, he thought there had been no felonious taking; and left to them the question of damages only, reserving leave for the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff with £50 damages.

In Michaelmas Term, Whitehurst obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered or a new trial had.[1]

PARKE, B. In this case there was clearly no bailment, because there was no intention to part with the property in question. It amounts therefore, only to a finding, and comes within the modern decisions on that subject. It is a matter fit for our serious consideration, and we will speak to the chief justice before we deliver our judgment. No doubt the same evidence is necessary in the present case as would be required to support an indictment. *Cur. adv. vult.*

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[1] Arguments of counsel are omitted. During the argument for the plaintiff PARKE, B., said: "Suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is: if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it." — ED.

The judgment of the court was now delivered by —

PARKE, B. My Lord Chief Justice thought in this case that, even assuming the facts of which evidence was given by the defendant to be true, the taking of the purse and abstracting its contents was not a larceny; and that is the question which he reserved for the opinion of the court, giving leave to move to enter a nonsuit. After hearing the argument, we have come to the conclusion that, if the defendant's case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff which ought to have been left to the jury, and which, if believed by them, would have given a colorable right to him to the contents of the secretary as well as to the secretary itself; namely, the declaration of the auctioneer that he sold all that the piece of furniture contained with the article itself; and then the abstraction of the contents could not have been felonious. There must therefore be a new trial, and not a nonsuit.

But if we assume, as the defendant's case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary if there happened to be anything in it, and indeed without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny.

It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that, though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule, that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constitutes a larceny. Under this head fall the cases where the finder of a pocket-book with bank-notes in it with a name on them converts them *animo furandi*; or a hackney coachman who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds and applies to his own use a pocket-book in a coat sent to him to repair by a customer, whom he must know; all these have been held to be cases of larceny; and the present is an instance of the same kind and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also from Wynne's case that if, under the like circumstances, he acquire possession and mean to act honestly, but afterwards alter his mind and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.

We therefore think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a color of right to the property.[1]

Rule absolute for a new trial.

REGINA v. THURBORN.

CROWN CASE RESERVED. 1849.

[*Reported* 1 *Denison C. C.* 387.[2]]

THE prisoner was tried before Parke, B., at the summer assizes for Huntingdon, 1848, for stealing a bank-note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use, when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe it to be the prosecutor's property, before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned Baron was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no *taking,* and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

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[1] *Acc.* Cartwright *v.* Green, 8 Ves. 405; Robinson *v.* State, 11 Tex. App 403 See Durfee *v.* Jones, 11 R. I. 588; s. c. 1 Gray's Cases on Prop. 380. — ED.

[2] This case was reported as Reg. *v.* Wood, 3 Cox C. C. 453. — ED.

On the 30th of April, A. D. 1849, the following judgment was read by PARKE, B: —

A case was reserved by Parke, B., at the last Huntingdon Assizes. It was not argued by counsel, but the judges who attended the sitting of the court after Michaelmas Term, 1848, namely, the L. C. Baron, Patteson, J., Rolfe, B., Cresswell, J., Williams, J., Coltman, J., and Parke, B., gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The learned Baron here stated the case.]

In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi,* and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose; by the term *animo furandi* is to be understood the intention to take, not a particular temporary, but an entire dominion over the chattel, without a color of right. As the rule of law founded on justice and reason is that *actus non facit reum nisi mens sit rea,* the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

In the earliest times it was held that chattels which were apparently without an owner, "nullius in bonis," could not be the subject of larceny. Stamford, one of the oldest authorities on criminal law, who was a judge in the reign of Philip and Mary, says, B. 1 ch. 16, "Treasure trove, wreck of the sea, waif or stray, taken and carried away is not felony." "Quia dominus rerum non apparet, ideo cujus sunt incertum est." For this he quotes Fitz. Abr. Coron. p. 187, 265; these passages are taken from 22 Ass. 99; 22 Ed. III., and mention only "treasure trove," "wreck," and "waif," and Fitz. says the punishment for taking such is not the loss of life or limb. The passage in 3 Inst. 108, goes beyond this; Lord Coke mentions three circumstances as material in larceny: first, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also explains; and thirdly, "it is not by trover or finding;" he then proceeds as follows: "If one lose his goods and another find them, though he convert them 'animo furandi,' to his own use, it is not larceny, for the first taking is lawful. So if one find treasure trove, or waif or stray (here 'wreck' is omitted and 'stray' introduced), and convert them *ut supra*, it is no larceny, both in respect of the finding, and that 'dominus rerum non apparet.'" The only authority given is that before mentioned: 22 Ass. 99; 22 Ed. III.

Now treasure trove and waif seem to be subject to a different construction from goods lost. Treasure trove is properly money supposed to have been hidden by some owner, since deceased, the secret of the deposit having perished, and therefore belongs to the Crown; as to waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted shew that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure trove and waif; wreck is not properly so called if the real owner is known, and it is not forfeited until after a year and a day.

The word "estray" is used in the books in different senses, as may be seen in Com. Dig. Waife, F., where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, where the property vests in the Crown, or its grantee of estrays; and also of cattle straying in the manor, before they are so forfeited. Blackstone, vol. 2, 561, Stephens' ed., defines estrays to be "such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the Sovereign."

In the passage in Stamford no doubt the word is used, not exclusively in the former sense, but generally as to all stray cattle not seized by the lord. Now treasure trove and waif, properly so called, are clearly "bona vacantia, nullius in bonis," and but for the prerogative would belong to the first finder absolutely.

"Cum igitur thesaurus in nullius bonis sit, et antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius domini regis." Bracton, Coron. L. 3, c. 3, p. 126. Wreck and stray, in the sense we ascribe to those words, are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but Lord Coke, in Constable's case, 5 Rep. 108 *a*, treats wreck also as "nullius in bonis;" and estrays, "animalia vagantia," he terms "vacantia," because none claims the property. Wreck and estray, however, before seizure, closely resemble goods lost, of which the owner has not the actual possession, and afford an analogy to which Lord Coke refers in the passage above cited.

Whether Lord Coke means, what the language at first sight imports, that under no circumstances could the taker of goods really lost and found be guilty of larceny, is not clear; but the passage is a complete and satisfactory authority that a person who finds goods which are lost may convert them *animo furandi* under some circumstances so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect of the finding, and also that they are apparently without an owner, "dominus rerum non apparet," *an* owner, "or" *the* owner does not appear.

The first of these reasons has led to the opinion that the real meaning of Lord Coke was not that every finder of lost goods who takes *animo furandi* is not guilty of felony, but that if one finds, and innocently takes possession, meaning to keep for the real owner, and *afterwards* changes his mind and converts to his own use, he is not a felon, on the principle that Lord Coke had previously laid down, viz., that "the intent to steal must be when the thing stolen cometh to his possession, for if he hath the possession of it once lawfully, though he hath *animum furandi* afterwards, and carryeth it away afterwards, it is no larceny;" and Lord Coke also cites Glanville, "Furtum non est ubi initium habet detentionis per dominium rei."

It is said therefore that the case of finding is an instance of this, — beginning with lawful title, which consequently cannot become a felony by subsequent conversion; but if it be originally taken, not for the true owner, but with intent to appropriate it to his own use, it is a felony; and of this opinion the commissioners for the amendment of the criminal law appear to have been, as stated in their first report.

This opinion appears to us not to be well founded; for Lord Coke puts the case of lost goods on the same footing as waif and treasure trove, which are really *bona vacantia,* goods without an owner, and with respect to which we apprehend that a person would not be guilty of larceny, though he took originally *animo furandi,* that is, with the intent, not to take a partial or temporary possession, but to usurp the entire dominion over them; and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of or by contract with the owner. But any doubt on this question is removed by what is said by Lord Hale, 1 P. C. 506: "If A. find the purse of B. in the highway and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony. The like in case of taking of a wreck or treasure trove," (citing 22 Ass. 99), "or a waif or stray." Lord Hale clearly considers that if lost goods are taken originally *animo furandi*, in the sense above mentioned, the taker is not a felon; and when it is considered that by the common law, larceny to the value of above twelve pence was punishable by death, and that the quality of the act in taking *animo furandi* goods from the possession of the owner. differs greatly from that of taking them when no longer in his possession, and *quasi derelict*, in its injurious effect on the interests of society (the true ground for the punishment of crimes), it is not surprising that such a rule should be established, and it is founded in strict justice; for the cases of abstraction of lost property being of rare occurrence, when compared with the frequent violations of property in the possession of an owner, there was no need of so severe a sanative, and the civil remedy might be deemed amply sufficient. Hawkins, B. 1, ch. 19, s. 3, Curwood's ed., says: "Our law, which punishes all theft with death, if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them (*e. g.*, cases of finding, and of appropriating by bailees) as civil than criminal offences, perhaps for this reason, in the case of goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before." It cannot indeed be doubted that if at this day the punishment of death was assigned to larceny and usually carried into effect, the appropriation of lost goods would never have been held to constitute that offence; and it is certain that the alteration of punishment cannot alter the definition of the offence. To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably *lost;* that is, that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore if a horse is found feeding on an open common or on the side of a public road, or a watch found apparently hidden in a haystack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them; and consequently had no right to treat them as lost goods. In the present case there is no doubt that the bank-note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged; and therefore, though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, "quia dominus rerum non apparet, ideo cujus sunt incertum est," and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject, some where the owner of the goods may be presumed to be known, from the circumstances under which they are found; amongst these are mentioned the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocket-book, found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or *derelict*. Some cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as Wynne's case, Leach C. C. 460, but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills, with the owner's name upon them.

This subject was considered in the case of Merry *v.* Green, 7 M. & W. 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check for instance, with the name of the owner on it, where a person originally took it up, intending to look at it and see who was the owner, and then, as soon as he knew whose it was, took it *animo furandi;* as, in order to constitute a larceny, the taking must be a trespass; and it was asked when in such a case the trespass was committed. In answer to that inquiry the dictum attributed to me in the Report was used: that *in such a case* the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use *animo furandi.*

It is quite a mistake to suppose, as Mr. Greaves has done (vol. 2, c. 14), that I meant to lay down the proposition in the general terms contained in the extract from the Report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked, as well as marked property. It was meant to apply to the latter only.

The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in other appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is does that make a difference? We think not; it was dispunishable as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.[1]

REGINA *v.* PRESTON.

Crown Case Reserved. 1851.

[*Reported* 5 *Cox C. C.* 390.]

The following case was reserved by the Recorder of Birmingham: — Michael Preston was tried before me, at the last Michaelmas Sessions for the borough of Birmingham, upon an indictment which charged him in the 1st count with stealing, and in the 2d count with feloniously receiving, a £50 note of the Bank of England. It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question, with others, on Saturday, the 18th of October, from a Mr. Ledsam, who, before he handed it to the prosecutor, wrote on the back of it the words, "Mrs. Collis." It was further proved that Collis was a very unusual surname in Birmingham, and almost, if not quite confined to the family of the prosecutor, a well-known master manufacturer. About four or five o'clock the same afternoon the prosecutor accidentally dropped the notes in one of the public streets of Birmingham, and immediately gave information of his loss to the police, and also caused handbills, offering a reward for their recovery, to be printed and circulated about the town. On Monday the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard anything of them he would let the police know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock on the same afternoon, the prisoner went to the shop of Mr. Nickley, in Birmingham, and, after inquiring if he (Nickley) had heard of the loss of a £50 note, stated that he (the prisoner) thought he knew parties who had found one; and he asked Nickley whether the finders would be justified in appropriating it to their own use, to which Nickley replied that they would not. At four o'clock the same afternoon the prisoner changed the note, and was, later in the same evening, found in possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts. He was then taken into custody, and on the following day, October 21, stated to a constable that when he was alone in his own house on Sunday, a tall man, whom he did not know, came in and offered him a £50 note, for which he (the prisoner) gave him fifty sovereigns. The police officers previously told the prisoner that they were in possession of information that one Tay, who was known to the prisoner, had found the note, but Tay was not called, nor was any evidence given as to the part (if any) which he took in the transaction. Upon these facts I directed the jury that the important question for them to consider was, at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. I also told the jury that there was no evidence of any other person having possession of the note after it was lost, except the prisoner, but that even though the prisoner might not be the original finder, still, if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny. The jury found the prisoner guilty upon the 1st count, and I request the opinion of the judges as to the validity of the conviction. The prisoner was discharged on the recognizances of himself and two sureties, to appear and receive judgment at the next sessions.

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[1] *Acc.* Reg. *v.* Scully, 1 Cox C. C. 189; Reg. *v.* Dixon, 7 Cox C. C. 35; Reg. *v.* Shea, 7 Cox C. C. 147; Reg. *v.* Christopher, 8 Cox C. C. 91; Reg. *v.* Glyde, 11 Cox C. C. 103; Reg. *v.* Deaves, 11 Cox C. C. 227; Bailey *v.* State, 52 Ind. 462; Wolfington *v.* State, 53 Ind. 343; State *v.* Dean, 49 Ia. 73. — Ed.

Bittleston,[1] for the Crown. The case of R. *v.* Thurborn was brought under the consideration of the Recorder; and construing his direction with reference to the facts stated, it does in substance follow the rule there laid down. It only means that the prisoner would be guilty of larceny if, when he first took complete possession of the note *animo furandi*, he then knew or had the means of knowing the owner. [ALDERSON, B. — The direction does not exclude the supposition that the prisoner in the first instance received the note with an honest intention, but afterwards altered his mind, and in a day or two resolved to appropriate it to his own use. But my brother Parke, in Thurborn's case, decided that the dishonest intention must exist as soon as the finder has taken the chattel into his possession so as to know what it is.] It is conceded that the very first moment of taking is not that at which the *animus furandi* and knowledge of the owner must exist to constitute larceny; because the chattel must be taken into the hand to ascertain what it is. The original possession, therefore, must necessarily be lawful in every case; and if the dishonest intention arising at the next minute may make the finder guilty of larceny, why may not the same dishonest intention arising afterwards have the same effect? What is a proper time for examining the thing may vary in different cases; and, if a man takes time to make inquiries, for the purpose of satisfying himself whether he can keep the chattel without risk of discovery, and ultimately resolves to appropriate it, is he to be held not guilty of larceny because he did not immediately make up his mind to deprive the owner of it? It is stated generally in the text-books (1 Bl. Com. 295, 5th ed.) that the finder of lost goods has a special property in them; and so, according to Armory *v.* Delamirie (1 Stra. 505), he has against all but the true owner; but as against the true owner he has no property whatever; and it is submitted, at all events with regard to marked property, that as between the finder and the loser, the possession of the former is, in law, that of the latter, so long as the latter intends to act honestly. He holds merely for the true owner; he had a bare custody: but as soon as he resolves to appropriate the goods to his own use he then converts that lawful custody into an unlawful possession; he commits a trespass; and is guilty of larceny, according to that class of cases where the owner, by delivering goods to the prisoner, does not part with the possession, but gives him the charge or custody of them only. [ALDERSON, B. — What do you say to that part of the direction which supposes that the prisoner was not the original finder?] It makes no difference whether the prisoner himself picked up the lost note, or whether the person who did, brought it to him and informed him of all the circumstances. That intermediate person might act with perfect honesty; and the prisoner receiving it under those circumstances would be in the situation of a finder. [MARTIN, B. — Suppose a man takes an umbrella by mistake, and, after keeping it for a few days, finds the owner, but does not return it; is there a felonious taking? LORD CAMPBELL, C. J. — You must contend that there is.] Yes, there would be no change in the possession until the dishonest intention arose. [LORD CAMPBELL, C. J. — Can there be a mental larceny? ALDERSON, B. — There must be a taking, and it must be a taking *animo furandi;* but the taking and the intent are distinct things.] In the cases of carriers, where the bailment is determined by breaking bulk, there is in truth no fresh taking. The carrier has possession of all the goods delivered to him for the purpose of carriage; but when he begins to deal dishonestly with them there is a constructive taking; and Parke, B., from the observation which he makes on Wynne's case, in Merry *v.* Green, seems to have thought so.

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[1] The argument of O'Brien for the prosecution is omitted.

LORD CAMPBELL, C. J. I am of opinion that this conviction cannot be supported. Larceny supposes a taking *animo furandi.* There must always be a taking; but in the present case it is quite consistent with the direction of the learned Recorder that the prisoner might be guilty of larceny though, when he took possession of it, with a full knowledge of the nature of the chattel, he honestly intended to return it to the owner whensoever he should be found; because he puts it that the important question is, at what time the prisoner first resolved to appropriate it to his own use. But when was the taking? It is said that whenever he changed his mind, and formed the dishonest purpose of appropriating the note to his own use, that then he took it constructively from the possession of the owner; but that dishonest purpose may have first come into his mind when he was lying in bed at a distance of many miles from the place where the note was. It seems to me that that operation of the mind cannot be considered a taking, and that, as there was no taking except the original taking, which might have been lawful, the conviction must be reversed. It is unnecessary to go into authorities upon this subject, after the elaborate judgment of my brother Parke in Thurborn's case.

ALDERSON, B. In order to constitute larceny, there must be a taking, as well as an intention to steal. The difficulty I feel in this case is to know how a taking, honest at first, can be converted into a dishonest taking by the subsequent alteration of intention. It is clear, in this case, that the learned Recorder left it open to the jury to convict the prisoner, even if they thought that at first he took the note honestly, but that he afterwards changed his mind, then knowing the owner; and it is argued that the formation of the dishonest intention alters the character of the possession, though the taking may have been a week before; but I think that that is a degree of refinement which would destroy the simplicity of the criminal law.

The other judges concurred.

Conviction quashed.[1]

REGINA *v.* WEST.

CROWN CASE RESERVED. 1854.

[*Reported Dearsley C. C.* 402.]

JERVIS, C. J.[2] The question is whether, under the circumstances stated in this case, the prisoner was properly convicted of larceny, and we are all of opinion that she was properly convicted. The prisoner keeps a stall in the Leicester market. The prosecutor went to that stall, left his purse there, and went away. The purse was pointed out to the prisoner by another person, and she then put it in her pocket, and treated it as her own, and on the prosecutor returning to the stall and asking for the purse, she denied all knowledge of it. Two questions were left to the jury: first, did the prisoner take the purse knowing that it was not her own, and intending to appropriate it to her own use? This the jury said she did. Secondly, did the prisoner then know who was the owner of the purse? This the jury said she did not. If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found; but there is in this case no reason for supposing that the property was lost at all, or that the prisoner thought it was lost. On the contrary, the owner, having left it at the stall, would naturally return there for it when he missed it.

There is a clear distinction between property lost and property merely mislaid, put down, and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding, therefore, does not arise.

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[1] *Acc.* Reg *v.* Matthews, 12 Cox C. C. 489. But see Beatty *v.* State, 61 Miss. 18 — ED.

[2] The opinion only is given; it sufficiently states the case.

The other learned judges concurred.[1] *Conviction affirmed.*

REGINA *v.* ROWE.

Crown Case Reserved. 1859.

[*Reported Bell C. C.* 93.[2]]

The following case was reserved by the Chairman of the Glamorganshire Quarter Sessions: —

At the Glamorganshire Midsummer Quarter Sessions, 1858, William Rowe was indicted for stealing 16 cwt. of iron of the goods and chattels of The Company of Proprietors of the Glamorganshire Canal Navigation.

It appeared by the evidence that the iron had been taken from the canal by the prisoner, who was not in the employ of the Canal Company, while it was in process of being cleaned. The manager of the canal stated that, if the property found on such occasions in the canal can be identified, it is returned to the owner. If it cannot, it is kept by the company.

It was objected that, as the Canal Company are not carriers, but only find a road for the conveyance of goods by private owners, the property was not properly laid as that of the Canal Company. The prisoner was convicted, and sentenced to two calendar months' imprisonment in the House of Correction at Cardiff, but was released on bail.

This case was considered, on 22d November, 1858, by Pollock, C. B., Wightman, J., Williams, J., Channell, B., Byles, J., and Hill, J.

No counsel appeared. *Cur. adv. vult.*

On 5th February, 1859, the judgment of the court was given by —

Pollock, C. B. The judges who have considered this case are unanimously of opinion that the conviction should be affirmed. The case finds that some iron had been stolen by the prisoner from the canal while the canal was in process of cleaning, and while the water was out. The prisoner was not in the employ of the Canal Company, but a stranger; and the property of the company in the iron before it was taken away by the prisoner was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the possession of the landlord for the purpose of delivering it up to the true owner; and he has sufficient possession to maintain an indictment for larceny.[1] *Conviction affirmed.*

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[1] *Acc.* Reg. *v.* Coffin, 2 Cox C. C. 44; Reg. *v.* Pierce, 6 Cox C. C. 117; Reg. *v.* Moore, 8 Cox C. C. 416; State *v.* McCann, 19 Mo. 249; People *v.* McGarren, 17 Wend. 460; Lawrence *v.* State, 1 Humph. 228. See McAvoy *v.* Medina, 11 All. 548; s. c. 1 Gray's Cases on Prop. 378. — Ed.

[2] s. c. 1 Gray's Cases on Prop. 375.

COMMONWEALTH *v.* TITUS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[*Reported* 116 *Massachusetts,* 42.]

INDICTMENT against Lucian M. Titus and Elbridge F. Horr, charging them jointly with the larceny of certain articles of personal property alleged to be the property of Nancy Meacham.

Trial in the Superior Court, before Aldrich, J., who allowed the following bill of exceptions: "The defendant Horr pleaded guilty. Titus pleaded not guilty. Upon his trial the government introduced evidence tending to prove the ownership of the property as alleged in the indictment; and that the owner, while riding on one of the public highways in Athol, lost the wallet or travelling bag containing the articles mentioned in the indictment; that the defendants, passing along the same highway not long after the loss of the bag, discovered it, picked it up, and afterwards appropriated the contents of the bag to their own use, and destroyed the bag by cutting it in pieces and concealing the same in a wood-lot remote from the place of finding.

"As bearing upon the question of the intent with which the defendant Titus originally took the bag and its contents, the government, against his objection, was permitted to introduce evidence to show what Titus said and did about the property and his possession of it, subsequently to the original finding and taking. This evidence was offered by the government and admitted by the court for the single purpose of proving, so far as it tended to do that, the intent with which Titus originally took the property into his possession at the time of finding it. And the jury were instructed that they could properly make no other use of this evidence as against the defendant.

"The defendant's counsel asked the court to rule that lost property cannot be the subject of larceny. This ruling the court declined to give; but did instruct the jury that to authorize a conviction of the defendant Titus, they must be convinced by the evidence in the case beyond all reasonable doubt: first, that at the time of the finding of the property by the defendant and the taking of it into his possession he had a felonious intent of appropriating the property to his own use and depriving the owner of it; secondly, that he then knew who the owner was, or then had reasonable means of knowing or ascertaining who the owner was.

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[1] See Elwes *v.* Brigg Gas Co., 33 Ch. D. 562; Goodard *v.* Winchell (Ia.), 52 N. W. 1124. — ED.

"The court further instructed the jury that if the evidence failed to satisfy them beyond every reasonable doubt that, at the time of finding the property, Titus knew or had reasonable means of knowing who the owner was; or if they should find that he did not originally take the property with the felonious intent of converting it to his own use, but formed such purpose afterwards, it would be their duty to acquit him.

"To the admission of the evidence objected to, the refusal to rule as requested, and the foregoing instructions, the defendant objected. Other and appropriate instructions, not objected to, in relation to the nature of the offence charged, and in relation to the evidence, the burden of proof, &c., were given.

"The jury returned a verdict of guilty, and the defendant alleged exceptions."

F. T. Blackmer, for the defendant, cited 2 East P. C. 663; Regina *v.* Wood, 3 Cox C. C. 453; Regina *v.* Preston, 2 Den. C. C. 353; s. c. 5 Cox C. C. 390; Regina *v.* Dixon, 7 ib. 35; Regina *v.* Christopher, 8 ib. 91; Regina *v.* Moore, ib. 416; Regina *v.* Glyde, 11 ib. 103; People *v.* Anderson, 14 Johns. 294; People *v.* Cogdell, 1 Hill, 94; Porter *v.* State, Mart. & Yerg. 226; Tyler *v.* People, Breese, 227; State *v.* Weston, 9 Conn. 527.

C. R. Train, Attorney General, for the Commonwealth, cited, in addition to some of the above cases, Regina *v.* Thurborn, 1 Den. C. C. 387; 2 Bennett & Heard's Lead. Crim. Cas. (2d ed.) 409, 417; Regina *v.* Shea, 7 Cox C. C. 147; Commonwealth *v.* Mason, 105 Mass. 163.

GRAY, C. J. The rulings and instructions at the trial were quite as favorable to the defendant as the great weight, if not the unanimous concurrence, of the cases cited on either side at the argument would warrant.

The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny.

It was argued for the defendant that it would not be sufficient that he might reasonably have ascertained who the owner was; that he must at least have known at the time of taking the goods that he had reasonable means of ascertaining that fact. But the instruction given did not require the jury to be satisfied merely that the defendant might have reasonably ascertained it, but that at the time of the original taking he either knew or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession or reach, at that time.

It was further argued that evidence of acts of the defendant, subsequent to the original finding and taking, was wrongly admitted, because such acts might have been the result of a purpose subsequently formed. But the evidence of the subsequent acts and declarations of the defendant was offered and admitted, as the bill of exceptions distinctly states, for the single purpose of proving, so far as it tended to do so, the intent with which the defendant originally took the property into his possession at the time of finding it. And the bill of exceptions does not state what the acts and declarations admitted in evidence were, and consequently does not show that any of them had no tendency to prove that intent, nor indeed that any acts were proved except such as accompanied and gave significance to distinct admissions of the intent with which the defendant originally took the goods.[1]

Exceptions overruled.

REGINA v. FINLAYSON.

Supreme Court of New South Wales. 1864.

[*Reported* 3 *New South Wales S. C. Reports*, 301.]

Stephen, C. J.[2] It appears that the prisoner was driving a mob of horses, when the horse in question (a branded animal, the ownership, therefore, of which was ascertainable in the neighborhood) joined the others — it being near the owner's run. Whether the prisoner (who was two or three hundred yards behind, having assistants ahead or at the side) saw at the time that this horse had joined his own horses, did not appear. But it was proved that the next morning, as the custom was, the prisoner counted over the entire mob, and then drove the whole on together to their destination. The learned judge, in substance, told the jury that assuming this to be a case of finding, yet the prisoner need not have formed the intent to appropriate the animal at the moment of its junction with the others, or of the then continued driving onward of the horses, but that it was necessary to show that such intent existed at the moment of taking. He left the question to them, therefore, whether the intent existed when the prisoner first did some act, or gave some direction by which he treated the horse as part of his own mob of horses, or incorporated it therewith. I am of opinion that this direction was right; and it seems to be doubtful whether the prisoner's case was one of finding at all. If it merely strayed, it was not lost, and could not therefore be found. But it appears that the next morning the prisoner counted the horses, and he therefore then saw this one among them, and determined to take possession of it. By the same act, he took possession, and determined to appropriate it.

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[1] *Acc.* Rountree *v.* State, 58 Ala. 381; Griggs *v.* State, 58 Ala. 425; State *v.* Levy, 23 Minn. 104; State *v.* Clifford, 14 Nev. 72; Baker *v.* State, 29 Oh. St. 184; Brooks *v* State, 35 Oh. St. 46. — Ed.

[2] The opinion only is given; it sufficiently states the case.

WISE, J., concurred. *Conviction sustained.*[1]

REGINA v. ASHWELL.

CROWN CASE RESERVED. 1885.

[*Reported* 16 *Cox C. C.* 1.]

CASE reserved for the opinion of the court by Denman, J., at the January Assizes, 1885, for the county of Leicester, which stated the following facts: —

On the 23d of January, 1885, Thomas Ashwell was tried for the larceny of a sovereign, the money of Edward Keogh.

Keogh and Ashwell met at a public house on the 9th of January.

At about eight P. M. Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that then he would repay him. Keogh consented, and putting his hand into his pocket, pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to Ashwell, and went home, leaving Ashwell in the yard. About nine the same evening Ashwell obtained change for the sovereign at another public house.

At 5.20 the next morning (the 10th) Keogh went to Ashwell's house and told him that he had discovered the mistake, whereupon Ashwell denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public house on the night before. But he afterwards said, "I had the sovereign and spent half of it, and I sha'n't give it him back, because I only asked him to lend me a shilling."

Mr. Sills, for the prisoner, submitted that there was no evidence of larceny, no taking, no obtaining by trick or false pretence, no evidence that the prisoner at the time he received the sovereign knew it was not a shilling. He referred to Regina v. Middleton, L. Rep. 2 C. C. R. 43, 45.

Mr. A. K. Loyd, for the prosecution, called my attention to Stephen's Criminal Law Digest, art. 299, and to the cases relating to larceny of property found.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the Court of Criminal Appeal. The passage in Stephen's Digest referred to is as follows: "Theft may be committed by converting property which the owner has given to the offender under a mistake which the offender has not caused, but which he knows at the time when it is made, and of which he fraudulently takes advantage. But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it."

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[1] *Acc.* Reg. *v.* Riley, 6 Cox C. C. 88; Dears. 149, *infra.* — ED.

The jury found that the prisoner did not know that it was a sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner, having soon after he received it discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign, but only of a shilling. They added that, if it were competent to them, consistently with these findings and with the evidence, to find the prisoner guilty, they meant to do so.

I entered a verdict of guilty, but admitted the prisoner to bail, to come up for judgment at the next assizes if this court should think that upon the above facts and findings the prisoner could properly be found guilty of larceny.

March 21. Before Lord Coleridge, C. J., Grove, Lopes, Stephen, and Cave, JJ.[1]

June 13. This case was reargued before the following learned judges: Lord Coleridge, C. J., Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Stephen, Mathew, Cave, Day, Smith, and Wills, JJ.

Smith, J., read the following judgment: The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh. The material facts are as follows: Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute? To constitute the crime of larceny at common law, in my judgment, there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent, there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In c. 19, § 1, at p. 142 of vol. i. of Hawkins' Pleas of the Crown, it is stated: "It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit* as well as *asportavit.* Whence it follows that if the party be guilty of no trespass in taking the goods he cannot be guilty of felony in carrying them away." As I understand, the counsel for the Crown did not really dispute the above definition, and indeed, if he had, upon further referring to the 3d Institutes, chap. xlvii., p. 107, and the 1st Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, Rex *v.* Mucklow, 1 Moody's Crown Cases, 161, and Regina *v.* Davies, Dears. 640, are good illustrations of what I have enunciated; and if other cases were wanted there are plenty in the books to the same effect. In the present case it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to show that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this, in my judgment, is also fatal to the act being larceny at common law. As to this last point, the law laid down by Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., in the case of Regina *v.* Middleton, L. Rep. 2 C. C. 45, is very pertinent; it is as follows: "We admit that the case is undistinguishable from the one supposed in argument of a person handing to a cabman a sovereign by mistake for a shilling; but after a careful weighing of the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and the question whether the cabman was guilty of larceny or not would depend upon this, — whether at the time he took the sovereign he was aware of the mistake and had then the guilty intent, the *animus furandi.*" I believe the above to be good law. The contention, however, of the Crown was that, although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent, — the proper direction to be given to a jury being, as I understood, "Did the prisoner, at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned?" See Regina *v.* Thurborn, 1 Denison's Crown Cases, 388, and Regina *v.* Glyde, L. Rep. 1 C. C. 139. If he did, he would be guilty of larceny; *aliter* he would not. Then it was argued, as argued it was by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support it. Keogh, in the present case, intended to deliver the coin to the prisoner and the prisoner to receive it. The chattel, namely, the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.*, instead of 12*d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that show that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely, the coin) in this case never was lost; then how could it be found? In my judgment the argument upon the point for the Crown is wholly fallacious and fails. It was further urged for the Crown that the present case was covered by authority, and the cases of Cartwright *v.* Green, 8 Ves. 405, and Merry *v.* Green, 7 M. & W. 623, were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first case, Cartwright *v.* Green, 8 Ves. 405, the question arose upon demurrer to a bill in Chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it which it was not necessary to touch for the purpose of repair with the intention of taking and appropriating to his own use whatever he should find therein, it was larceny. I conceive this to be distinctly within the principle I have above stated, — there was the taking against the will of the owner with the felonious intent at the time of taking. The other case, namely, Merry *v.* Green, 7 M. & W., 623, which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Parke, B., who delivered the judgment of the court, upon the principles applicable to a case of finding. The learned Baron says: "It seems to us that though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies." I understand the learned Baron, when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel; for there are no cases extant as to finding out a mistake to which his remark could apply. That, too, is the distinction between the present case and that before Parke, B. In Merry *v.* Green, 7 M. & W. 623, no intention to deliver the chattel (namely, the purse and money) at all ever existed, whereas in the present case there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received. In my judgment a man who honestly receives a chattel by delivery thereof to him by its true owner cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offence. The second point has now to be considered, namely, was he guilty of larceny as a bailee within the true intent of § 3 of 24 & 25 Vict. c. 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract express or implied to return the chattel or obey the mandate with which the delivery is clogged, or in other words, a delivery upon condition. The question as it seems to me is this, Is the law in the present case to imply a condition when we know perfectly well that at the time of the delivery of the coin no condition at all was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages? No condition to return the coin delivered to the prisoner was ever thought of, and in my judgment, such a condition cannot be implied. Should, however, any condition be implied as to what was to be done if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes 19*s.* out of the 20*s.*; and I am of opinion that if the prisoner had, upon finding out the mistake, taken to Keogh 19*s.*, he would have been strictly within his rights. The case of Regina *v.* Hassall, L. & C. 58, is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment the prisoner was not a bailee of the sovereign for the reasons above given. I am fully alive to the remark which has been made, that if the present case is not one of larceny, it should be. Whether this remark is well founded or not I do not pause to inquire; but it seems to me that the observations of Bramwell, B., in Regina *v.* Middleton, L. Rep. 2 C. C. 38, on this head are well worthy of consideration. Believing, however, as I do, that according to the law of England, as administered from the earliest times, the present case is not a case of larceny at common law, I cannot hold otherwise than I do; and as for the reasons given above, the prisoner is not, in my opinion, guilty of larceny as a bailee, my judgment is that the conviction should be quashed.[1]

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[1] Arguments of counsel are omitted.

CAVE, J. (As the learned judge was unable to attend, the following judgment, written by him, was read by Lord Coleridge, C. J.) The question we have to decide is, whether under the circumstances stated in the case the prisoner was rightly convicted of larceny, either at common law or as a bailee. It is undoubtedly a correct proposition that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen; or in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own, and the taking under those circumstances was a trespass. It is contended that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but to my mind, it is impossible to come to the conclusion that at the time when the sovereign was handed to him, the prisoner, who was then under a *bona fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign in instead of a shilling. The only point which can be made in favor of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the prisoner would have gained the property in and the possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin no property passed, and the question is whether the possession passed when the coin was handed to the prisoner or when the prisoner first knew that he had got a sovereign and not a shilling. There are four cases which it is important to consider. The first is Cartwright *v.* Green, 8 Ves. 405, which, however, differs slightly from the present, because in that case there was no intention to give the defendant Green either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas. In Merry *v.* Green, 7 M. & W. 623, the facts were similar to Cartwright *v.* Green, 8 Ves. 405, except that the bureau had been sold to the defendant. In that case Parke, B., says that though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer. If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities toward the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has without his knowledge been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it. A case much urged upon us on behalf of the prisoner was Rex *v.* Mucklow, 1 Moody's Crown Cases, 160. In that case a letter containing a draft for £10 11*s.* 6*d.* had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft, and was tried and convicted of larceny. The conviction, however, was held wrong on the ground that he had no *animus furandi* when he first received the letter. Here, as in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it he must have known that it was not meant for him, yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him. In Regina *v.* Davies, Dearsley's Crown Cases, 640, the facts were similar to those in Mucklow's case, 1 Moody's Crown Cases, 161; and Erle, C. J., then Erle, J., who tried the case, directed the jury that if at the time the prisoner received the order he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion the prisoner had not received it until he had discovered, by opening and reading the letter, whether it belonged to him or not. "I considered," says the judge, "that the law of larceny laid down in respect of articles found was applicable to the article here in question." The court, however, quashed the conviction on the authority of Mucklow's case, 1 Moody's Crown Cases, 160. In Regina *v.* Middleton, L. Rep. 2 C. C. 38, in which it was held by eleven judges against four that, where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority, which is as follows: "We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, — whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." For my part, I am quite unable to reconcile the cases of

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[1] Concurring opinions were delivered by MATHEW, FIELD, MANISTY, and STEPHEN, JJ. DAY and WILLS, JJ., also concurred.

Rex *v.* Mucklow, 1 Moody C. C. 161 and Regina *v.* Davies, Dears. C. C. 640, and the passage I have cited from Regina *v.* Middleton, L. Rep. 2 C. C. 38, with those of Cartwright *v.* Green, 8 Ves. 405 and Merry *v.* Green, 7 M. & W. 623; and being compelled to choose between them, I am of opinion that the law is correctly laid down in Merry *v.* Green, 7 M. & W. 623, for the following reasons: The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact, presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities toward the absolute owner which may make the possession more of a burden than a benefit. In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in Merry *v.* Green, 7 M. & W. 623, was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that while still ignorant that the coin was a sovereign he had given it away to a third person, who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20*s.*? In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents, whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice. Batson *v.* Donovan, 4 B. & A. 21. In this case, Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin, whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am therefore of opinion that he falls within the principle of Regina *v.* Middleton, L. Rep. 2 C. C. 45, and was guilty of larceny at common law. For these reasons, I am of opinion that the conviction was right.[1]

REGINA *v.* FLOWERS.

CROWN CASE RESERVED. 1886.

[*Reported* 16 *Cox C. C.* 33.]

CASE reserved by the learned Recorder for the borough of Leicester, at the last Epiphany Quarter Sessions for that borough, upon the trial of an indictment which charged one Charles Flowers with having, on the 31st day of October, 1885, while being servant to one Samuel Lennard and another, feloniously stolen, taken, and carried away certain money to the amount of seven shillings and one penny halfpenny, the property of the said Samuel Lennard and another, his masters.

It appeared from the case that the prisoner had been for about three months next preceding the 31st day of October, 1885, a clicker in the service of Messrs. Lennard Brothers, a firm of shoe manufacturers in Leicester, in whose establishment the following mode of payment of the wages of their employees was adopted, namely: —

The amount of wages due to each workman was calculated from the time-book and entered into the wages-book. Each amount was then made up and put into a small paper bag, which was then sealed; and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to one Francis Cufflin (the clerk) to have the mistake rectified.

On the 31st day of October there was due to the prisoner the sum of sixteen shillings and eight pence, and after the workmen had been paid their wages the prisoner came to Cufflin and said that he was three pence short, and gave him the bag into which his money had been put. The top of the bag had been torn off, and the bag was empty. Another workman named Jinks had also come to Cufflin for a correction in his money, stating that fivepence or sixpence was due to him, and had handed to Cufflin his bag with seven shillings and eleven pence halfpenny in it. Cufflin thereupon gave the prisoner by mistake Jinks's bag, and also three pence in copper, into his hand, and the prisoner, having received Jinks's bag, went away immediately, and in the presence of one of his fellow-workmen emptied the contents of Jinks's bag into his hand, saying, "The biter has got bit; he has paid me double wages." He then turned to another man and said, "Come on, we 'll go and have a drink on it."

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[1] Concurring opinions were delivered by Lord COLERIDGE, C. J., and DENMAN, J. GROVE and HAWKINS, JJ., POLLOCK and HUDDLESTON, BB., also concurred.

In accordance with the opinion of Smith, J., see Reg. *v.* Jacobs, 12 Cox C. C 151; Bailey *v.* State, 58 Ala. 414.

In accordance with the opinion of Cave, J., see State *v.* Ducker, 8 Or. 394. — ED.

At the close of the case for the prosecution, it was submitted on behalf of the prisoner that there was no case to go to the jury, as the evidence failed to show that the prisoner at the time he received the seven shillings and eleven pence halfpenny from Cufflin had the *animus furandi*, or guilty mind, essential to constitute the offence of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offence of larceny was concerned.

The learned Recorder, however, held that there was evidence to go to the jury of the prisoner having the *animus furandi* at the time he received from Cufflin the money, and he also ruled, in deference to the opinion of certain of the learned judges in Regina *v.* Ashwell, 53 L. T. Rep. N. S. 773; 16 Cox C. C. 1; 16 Q. B. Div. 190; 55 L. J. 65, M. C., that if the prisoner received the money innocently but afterwards fraudulently appropriated it to his own use, he was guilty of larceny. Having directed the jury to this effect, he put to them the following questions, namely: —

1. Did the prisoner, from the time he received from Cufflin the bag containing the seven shillings and eleven pence halfpenny, know that it did not belong to him? To this the jury answered, No.

2. Did the prisoner, having received the bag and its contents innocently, afterwards fraudulently appropriate them to his own use? And to this the jury answered, Yes.

The learned Recorder thereupon directed a verdict of guilty to be entered on the first count of the indictment, which was that above set out, and reserved the question for the consideration of this court whether, the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the seven shillings and eleven pence halfpenny from Cufflin, he could be rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the said money to his own use.

No one appeared on behalf of the prosecution or the prisoner.

Lord Coleridge, C. J. This case might have raised a very subtle and interesting question. The manner in which the learned Recorder has stated it, however, raises a question which is distinguishable from that which was raised in the case of Regina *v.* Ashwell. Now, in that case, the judges who decided in favor of the conviction never meant to question that which has been the law from the beginning, and to hold that the appropriation of chattels which had previously been innocently received should amount to the offence of larceny. If that case is referred to, it will be seen that I myself assumed it to be settled law that where there has been the delivery of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny except by statute. In the present case, however, the learned Recorder appears to have directed the jury that, if the prisoner received the 7*s.* 11½*d.* innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny. But no such rule was intended to be laid down in Regina *v.* Ashwell, and the direction of the learned Recorder was not, in my opinion, in accordance with that decision. It is quite possible for the jury to have considered consistently with that direction that a fraudulent appropriation, six months after the receipt of the money, would justify them in finding the prisoner guilty of larceny. The question we are asked is, whether the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money, he was rightly convicted of larceny by reason of the subsequent fraudulent appropriation. In my opinion he was not. The judgment of those judges who affirmed the conviction in Regina *v.* Ashwell, if carefully read, shows that they considered that to justify a conviction for larceny there must be a taking possession simultaneously with the formation of the fraudulent intention to appropriate, and that was not the case here.

Manisty, J. I am of the same opinion. The difference of opinion among the judges who decided the case of Regina *v.* Ashwell was in the appplication to the particular facts in that case of the settled principle of law that the innocent receipt of a chattel, coupled with the subsequent fraudulent appropriation of that chattel, does not amount to larceny. And while certain of the judges were of opinion that there had been a fraudulent taking and not an innocent receipt, and held that Ashwell had been guilty of larceny, the others, on the contrary, were of opinion that there had been an innocent receipt, and that therefore there had been no larceny. I am glad to think that the old rule of law remains unaffected.

Hawkins, J. The old rule of law was not questioned by any of the judges in Regina *v.* Ashwell. This case is distinguishable, for here the learned Recorder told the jury that if the prisoner received the 7*s.* 11½*d.* innocently but afterwards fraudulently appropriated that money to his own use, he was guilty of larceny. It appears clear to me that that direction could not be right, and that the learned Recorder misapprehended the rule of law.

Day, J. I was one of those who dissented from affirming the conviction in Regina *v.* Ashwell, and have only to add that, in my opinion, this conviction cannot be supported.

Grantham, J. I am of the same opinion.

Conviction quashed.

REGINA *v.* HEHIR.

COURT OF CROWN CASES RESERVED, IRELAND. 1895.

[*Reported* 18 *Cox C. C.* 267.[1]]

CASE reserved by the Right Hon. the Lord Chief Baron, as follows:

At the Assizes for the Munster Winter Assize County, 1894, held at Cork under the provisions of the Munster Winter Assize County Order, 1864, Denis Hehir was tried before me and a common jury for the larceny of "nine pounds sterling, of the goods and chattels of one John Leech;" but during the course of the trial, upon the application of Mr. Bourke, Q. C., counsel for the Crown, I allowed the indictment to be amended by striking out the words "nine pounds sterling," and substituting therefor the words "a ten pound note." A copy of the indictment is contained in the Appendix.

Evidence was given that John Leech, the master of the brigantine *Uzziah*, which was then in Limerick, engaged the prisoner, Denis Hehir, to assist in the discharge of the cargo. On the 20th day of September last Leech owed Hehir for work done in such discharge the sum of 2*l.* 8*s.* 9*d.* For the purpose of paying this sum Leech, on said 20th day of September, handed the prisoner nine shillings in silver and two bank notes, each of which both Leech and the prisoner believed to be a 1*l.* note. One of these notes was in fact a 10*l.* note. The prisoner left taking away the two notes with him. Within twenty minutes afterwards Leech discovered his mistake and went in search of the prisoner, whom he found within half an hour after he had given him the notes. Leech told the prisoner that he had given him a 10*l.* note instead of a 1*l.* The prisoner alleged that he had already changed both the notes. There was evidence that at the time when the prisoner first became aware that the note was for 10*l.* (which was a substantial period after it had been handed to him by Leech) he fraudulently and without colour of right intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note and disposed of the proceeds thereof.

Mr. Bourke referred me to Reg. *v.* Ashwell (16 Cox, C. C. 1) and Reg. *v.* Flowers (16 Cox C. C. 33; 54 L. T. Rep. 547).

In order to have an authoritative decision upon the question, upon which the Court for Crown Cases Reserved in England was, in Reg. *v.* Ashwell, equally divided, I left the case to the jury, who found the prisoner guilty, and I reserved for this Court the question hereinafter stated. I allowed the prisoner to remain out on bail to come up for sentence at the next assizes for the county of the city of Limerick.

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[1] The official report (1895), 2 Ir. 709, gives the opinions at length. — ED.

I request the opinion of this Court upon the question, "Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the *animus furandi* when Leech handed him the 10*l.* note?"

MADDEN, J., said: I consider the conviction in the present case was good at common law. The law being the same in both countries, the English cases are applicable. We are not, however, absolved by Reg. *v.* Ashwell from the duty of forming an independent judgment. Does the evidence show the taking by Hehir to have been *invito domini?* If the handing of the note by Leech to Hehir amounted to delivery, no fraudulent intention would suffice to constitute larceny. There was a fiscal transfer. Men are presumed to know the consequences of their own acts. Does the transfer of physical possession, made under such a mistake, amount to a delivery of legal possession? I think not, if it is accepted under a common mistake. If the owner intends the specific property to pass, it is not larceny; but where there is a mistake as to identity, it is different. There must be intelligent delivery, and not the mere physical fact from which intelligence is absent. I rest my judgment on the fact that the mistake was not one of value, but of identity; not the paper *per se*, but the money it represents. The case would be plainer if the exchange were carried on, as in some nations, by means of shells or precious stones. A mistake between a 10*l.* note and a 1*l.* is the same. Any consent given or act done in consequence of such mistake can have no legal value whatever. The case of Merry *v.* Green presents no substantial or essential difference to the present case. It was a case of transfer of physical possession. Delivery was there made in ignorance of the existence of the chattel. In either case the *dominus* remained *invitus*, for the element of intelligent delivery was wanting. Cases of finding do not throw much light on the question. Assuming the *dominus* to be *invitus*, was there any felonious taking of the money at all? In Reg. *v.* Middleton the question was not as to the effect of knowledge coincident with the taking. The rule which governs this case is simple: it is, "A man to whom a chattel is delivered under a mistake as to its identity does not thereby obtain legal possession; and if he subsequently learns the mistake and retains its possession, he is guilty of larceny."

GIBSON, J., said: On the question of consent or non-consent there is no substantial difference between a bank-note and any other chattel. First, as to acquisition. Legal possession imports knowledge. Here there was a physical delivery without knowledge. Until knowledge the law should not attribute to the taker the object of taking without consent. If upon discovery he elects to return the chattel, then it amounts to custody rather than possession; if he appropriates, then either the possession becomes wrongful, or then and there, for the first time, there is a taking out of possession of the owner of the chattel, which previously was lost; he commits a tort. Secondly, as to the lawfulness of the possession. Consent to possession obtained by fraud or force *animo furandi* is unlawful. Physical delivery is evidence of consent, but is rebuttable. Even without *animus furandi* a taker who at delivery is aware of a mistake, his possession is not innocent. The taker there is not misled. The question of consent is one of substance, not of form. Delivery under mistake does not work an estoppel. The taker is bound to give up the chattel on demand. The protection given to mistake does not extend to wilful fraud. I express no opinion on the question of bailment; it was not argued. Of seven cases relating to this principle of mistake, only two are against the view I take. The cases on lost property are distinguishable. The bureau cases seem in direct conflict with the post-office cases. Hehir, who is morally a rogue, is legally a thief.

HOLMES, J., said: All acts to carry legal consequences must be acts of the mind. The prosecutor did not intend to give, or know that he was giving, and Hehir did not intend to receive, or know he was receiving; therefore possession remained in the owner. When the taker discovers that he has a chattel which the owner did not intend to give, he then takes it the first time, and if he retains it he is guilty of larceny.

MURPHY, J., said: As to the moral aspect of the defendant's conduct it was clearly just as bad as if he had picked the owner's pocket. But it is said that in consequence of the means he adopted he is not guilty of larceny. The case is governed by Reg. v. Ashwell, where fourteen judges were equally divided.

JOHNSON, J., said: In my opinion Hehir is not guilty, because a man who honestly receives a chattel with consent of the true owner cannot be found guilty of larceny. Larceny by common law is felonious taking and carrying away from a person. It must be felonious, and this intent to steal must be when it comes to his hand. There must be an actual taking. Hawkins, in his "Pleas of the Crown," adopts Coke's definition of larceny. We are not here concerned with what the law of dishonesty is; the severity of the ancient criminal law led to the distinction I refer to, but still the principle of law remains to-day the same. Where no trespass is there is no larceny at common law. Here there was no trespass. Leigh gave Hehir two notes, 1*l.* and 10*l.* He intended to give Hehir the property in one of the notes; what difference is there from the giving of the other note at the same time? Hehir had no *animus furandi* when he took the notes and obtained possession of them.

ANDREWS, J., said: I think the conviction ought to be quashed. I think the property in the note immaterial in this case; no doubt it did not pass to the prisoner. When Leech handed the notes to Hehir he intended to give Hehir possession of the thing he handed. His intention arose from mistake; that does not show that the intention does not exist. In fact, he handed the note to Hehir, knowing that he was handing it to him. A man can take and be in possession of a chattel of which he does not know the value, or believes it to be of a different value or quality from its real value or quality. As regards taking, it is an absolute fiction to say that, although Hehir actually took the note when handed to him, he did not then take it, but only at a subsequent time when he discovered it was something different, and that he then took it, when he really did not take it at all, for he had it for some time in his possession. This is to ignore the actual taking, and make a mere movement of the mind amount to an actual taking. At the time Hehir received possession of the note he got lawful possession of it, and committed no trespass whatever. He took the 10*l.* note innocently and with the consent of the owner, not fraudulently; therefore he is not guilty of larceny. In Reg. *v.* Ashwell the conviction was not affirmed, but stood merely because it was not quashed. It is for the Legislature to make this transaction larceny.

O'Brien, J., said: The question of consent did not exist in the owner's mind as to the 10*l.* By his own act he put it into the possession of Hehir. The latter was not guilty of larceny. In order to make him out so, we must hold that he "feloniously took," when in fact he did not take at all. We must invent a new criminal category; he is a "finder-out," by an operation of mind. The *asportavit* disappears altogether in this case. The corporeal transfer cannot be left out in the idea of larceny. What was the position of Hehir between the taking of the article and the discovery of the mistake by him? Excusable detention, I suppose. He is then a party innocent at first, and afterwards guilty. I do not consider that Reg. *v.* Ashwell levels all the previous cases. It was a divided judgment. No crime has been committed in this case, only a moral transgression, as to which the law has not hitherto given effect to the views of those who think to compass the sea by undertaking to push the confines of crime into the boundless regions of dishonesty. The conviction should be reversed.

Palles, C. B., said: I admit that the prisoner in this case was a dishonest one, but it is punishable not by the judges but by the Legislature. Reg. *v.* Mucklow, Reg. *v.* Davies, and Reg. *v.* Middleton are all against the conviction. Reg. *v.* Ashwell said the two first were overruled. In it the opinion of seven judges was adverse to a conviction in a case like the present. For fifty-eight years there was an unbroken series of decisions that acts similar to that of the prisoner were not larceny. In Reg. *v.* Ashwell a technical rule maintained the conviction. Cartwright *v.* Green and Merry *v.* Green, cited for the Crown, are civil cases. I doubt the right of the Court for Crown Cases Reserved in England to reverse a previous decision of their own Court in a previous case. There is no inconsistency between these two civil cases (neither of which was decided by a court of equal authority with that of the Court for Crown Cases Reserved) and the criminal cases. In both the bailor and bailee were ignorant of the existence of the chattel. There was no intentional manual delivery of the chattel. There was that knowledge in the present case. Reg. *v.* Ashwell has not a single prior case to support it. It was a case of first impression. The ground upon which it was arrived at is given in the judgment of COLERIDGE, C. J., in whose mind there must have been some serious misapprehension. I hold that it would not be competent to the court in England to uphold the conviction in Reg. *v.* Ashwell, and it is only by following that case that it can be upheld in the present case. As regards written contracts, see Scott *v.* Littledale (8 E. & B. 815). In written instruments the intention must be gathered from the writing. Why should a man not be held to intend that which is the consequence of his act? So long as Hehir believed the note to be for 1*l.*, the prosecutor cannot be heard to say that he had not the intention of parting with it, and till the discovery of the mistake Hehir had lawful possession of it. There is no difference between the case here and that of a person counting notes and giving nine notes instead of ten. Hehir might lawfully detain the 10*l.* note till he had an opportunity of changing it and giving back 9*l.* to Leech. Hehir must have had lawful possession antecedent to the discovery of the mistake, and that discovery cannot by relation back change the character of the antecedent possession, which was Hehir's possession, into that of Leech. Hehir was not guilty of larceny at common law.

Sir PETER O'BRIEN, Bart., C. J., in agreeing with the Chief Baron, referred to Reg. *v.* Flower, and said: "The innocent receipt of a chattel and its subsequent appropriation does not constitute larceny. Leech gave unreservedly, Hehir honestly received. The fact of his mistaken belief made Leech give the note without any reservation whatever. Reg. *v.* Mucklow was recognized in Reg. *v.* Davies, although not argued at the Bar. It was a moot point among the judges. It is not consistent with Cartwright *v.* Green. There was here no felonious taking. However we dislike the law we must follow it.

The conviction was accordingly quashed.

[illegible]

SECTION II. (*continued*).

(*d*) TORTIOUS POSSESSION.

REGINA *v.* TOWNLEY.

CROWN CASE RESERVED. 1871.

[*Reported* 12 *Cox C. C.* 59.]

CASE reserved for the opinion of this court by Mr. Justice Blackburn.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing 126 dead rabbits.

In one count they were laid as the property of William Hollis; in another as being the property of the Queen.

There were also counts for receiving.

It was proved that Selsey Forest is the property of her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of her Majesty was given in evidence, which I thought amounted in legal effect merely to a license to Mr. Hollis to kill and take away the game, and that the occupation of the soil and all rights incident thereto remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence showed that Mr. Hollis's keepers, about eight in the morning on the 23d of September, discovered 126 dead and newly killed rabbits and about 400 yards of net concealed in a ditch in the forest behind a hedge close to a road passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keepers lay in wait, and about a quarter to eleven on the same day Townley and a man, who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley and came into the forest and went straight to the ditch where the rabbits were concealed and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrong-doer became the property of the owner of the soil, in this case the Queen (Blades *v.* Higgs, 7 L. T. N. S. 798, 834); and that even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

1 Hale, P. C. 510, and Lee *v.* Risdon, 7 Taunt. 191, were cited.

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

The question for the court is, whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C. J. (*after stating the facts*). The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ*, and are not the subject of absolute property; though at the same time they are a particular species of property *ratione soli*, — or rather the owner of the soil has the right of taking and killing them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in Blades *v.* Higgs, *supra*, as to rabbits, and in Lonsdale *v.* Rigg, 26 L. J. 196, Ex., as to grouse. In this case the rabbits having been killed on land the property of the Crown, and left dead on the same ground, would therefore in the ordinary course of things have become the property of the Crown. But before a person can be convicted of larceny of a thing not the subject of larceny in its original state, as, *e. g.*, of a thing attached to the soil, there must not only be a severance of the thing from the soil, but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruit therefrom, lead from buildings, fixtures, and minerals. But if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land; but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers or connected with them. Under these circumstances we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

MARTIN, B. I am of the same opinion. It is clear that if a person kills rabbits and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits and goes and hides them and comes back to carry them away, can it be said that is larceny? A passage from Hale's P. C. 510, "If a man comes to steal trees, or the lead off a church or house, and sever it, and after about an hour's time or so come and fetch it away, it is felony, because the act is not continuated, but interpolated. and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead off Westminster Abbey," was relied on by the prosecution. There is also a dictum of Gibbs, C. J., to the same effect in Lee *v.* Risdon, 7 Taunt. 191. I am not insensible to the effect of those dicta; but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of taking them away, in continuation of the original intention, it does not amount to larceny.

Bramwell, B. Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C. J., have said in the passages referred to. If a man having killed rabbits on the land of another, gets rid of them because he is interrupted and then goes away and afterwards comes back to remove the rabbits, that is a larceny; and so, if on being pursued, he throws them away; and it is difficult to perceive any distinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed it having abandoned it afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the act is not, as Lord Hale expresses it, continuated. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit, though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house or upon the land of a neighbor. If they had been left on the land of a neighbor or at a public house, could it have been said to be larceny? Clearly not; and if not why is it larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the dicta of Lord Hale and Gibbs, C. J., but that here the act was continuous, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

Byles, J. I cannot say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit and afterwards picked it up that could be converted into larceny, yet that would follow if the conviction were upheld.

Blackburn, J. I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled where the thing taken was not a chattel, as where a tree was cut down and carried away, that was not larceny, because the tree was not taken as a chattel out of the owner's possession and because the severance of the tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in Blades *v.* Higgs, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because, as Lord Cranworth said, "Wild animals whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake while living of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property; and the same principle is applicable to wild animals." The principle is as old as 11 Year Book (par. 33), where it is reported that a forester who had cut down and carried away trees could not be arraigned for larceny though it was a breach of trust; but it was said it would have been a different thing if the lord of the forest had cut down the trees and the forester had carried them away, then that would have been larceny. So that in the case of wild animals if the act of killing and reducing the animals into possession is all one and continuous, the offence is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear that during the three hours they were lying there, no one had any physical possession of them and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's P. C. 510, where it is said that larceny cannot be committed of things that adhere to the freehold, as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that where a man severed lead from Westminster Abbey and after about an hour's time came and fetched it away, it was felony, because the act is not continuous but interpolated; and Lord Hale refers to Dalton, c. 103, p. 166; and Gibbs, C. J., expressed the same view very clearly in Lee *v.* Risdon. Now if that is to be understood as my brother Bramwell explained, I have no fault to find with it; but if it is to be said that the mere fact that the chattel having been left for a time on the land of the owner has thereby remained the owner's property, and that the person coming to take it away can be convicted of larceny, I cannot agree with it as at present advised. If we are to follow the view taken by my brother Bramwell of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that in point of principle it cannot make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my brother Bramwell has interpreted it, and if so the facts do not bring this case within it.

Conviction quashed.[1]

REGINA *v.* FOLEY.

CROWN CASE RESERVED, IRELAND. 1889.

[*Reported* 26 *Law Reports* (*Ireland*), 299.]

CASE reserved by Mr. Justice Gibson as follows for the opinion of this court: —

The accused, Edward Foley, was tried before me at Maryborough Summer Assizes, 1889, for the Queen's County, for larceny of hay. The indictment was at common law.

Foley had been tenant to a Mr. Kemmis of part of the lands of Ballyadams in said county, but his tenancy had been determined by a civil-bill decree in ejectment, dated the 1st January, 1888, which was duly executed, and possession taken on the 27th April, 1888, when the house on the premises was levelled.

On August the 10th, 1888, the accused was seen by the police cutting meadow on the said lands with a scythe. On the 11th he was again seen cutting meadow there. A police constable went to him there and said, "He was glad some one would be responsible for the cutting," when Foley replied, "He might as well have it as the landlord."

On the 13th August Foley proceeded to rake up the hay, which was then lying scattered in the field, and put it into a cart. He took altogether ten or twelve cwt., and brought it away in the direction of Athy.

Mr. Leamy, counsel for the prisoner, contended that there was no larceny, as the indictment was at common law, and the taking was one continuous act: relying on The Queen *v.* Townley, L. R. 1 C. C. R. 315.

Mr. Molloy, Q. C., for the Crown, *contra*, contended that the hay was to be deemed in the possession of Mr. Kemmis at the time when the prisoner removed it.

In reply to a question put by me the jury said that the prisoner did not abandon possession of the grass cut between the time of cutting and time of removing the same.

It must be taken that Mr. Kemmis was in possession of the evicted farm at the time when the grass was cut and removed. There was no evidence of any act done by Mr. Kemmis, or any person on his behalf, on the evicted farm from the date of eviction until the removal of the hay; nor was there any evidence of any act done by the prisoner in reference to the farm or the grass cut, save as above stated.

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[1] *Acc.* Reg. *v.* Petch, 14 Cox C. C. 116. — ED.

Mr. Molloy, Q. C., further contended that there was no evidence to support the special finding.

I advised the jury to convict the prisoner, which they did, but I did not sentence him, and he stands out on his own recognizance, pending the decision of this case.

The question for the court is, whether, on these facts, the prisoner was properly convicted of larceny.

J. G. GIBSON.[1]

E. Leamy, for the prisoner.

Molloy, Q. C., with him *T. P. Law, Q. C.*, for the Crown.

GIBSON, J.[2] I reserved this case for the purpose of settling a question arising, or supposed to arise, on the decision in Reg. *v.* Townley, L. R. 1 C. C. R. 315. The evidence is meagre. Assuming that the cutting of the meadow by the accused was some evidence of an assumption of possession of the grass cut, there was no evidence, in my opinion, of any effective possession by him of the grass so cut and left lying on the owner's ground from that time until it was carried away, — though it must be taken that Foley did not intend to abandon such grass. On these facts prisoner's counsel, relying on Reg *v.* Townley, L. R. 1 C. C. R. 315, contended that the prisoner could not be convicted of larceny. The authorities cited by Mr. Molloy, Q. C. (to which may be added East, Pl. Cr., vol. 2, p. 587, and Gabbett, Crim. Law, p. 557), establish that where a thief, after severing things parcel of the realty, left the chattels so severed on the proprietor's soil, and after an interval came again and took them away he would be guilty of larceny at common law, the chattels being at the time of removal in the constructive possession of the rightful owner. The principle of common law would seem to be that, when the wrong-doer's actual and effective possession ceases he cannot be deemed to be in constructive possession, and that such constructive possession of the severed chattels, crops, fixtures, or otherwise, becomes vested in the rightful owner, on whose land they are left, by virtue of his right to possession.

For the prisoner it was argued that Townley's case, L. R. 1 C. C. R. 315, is an authority against this view, and that if wrongful possession is once acquired by the thief, the fact that he may afterwards before removal cease to be in effective occupation and control is immaterial, if he does not intend to relinquish the wrongful possession, and in pursuance of his original intent comes and takes away the property.

That this contention may not be entirely without color is shown by the way Townley's case, L. R. 1 C. C. R. 315, is treated by well-known writers. Thus, Mr. R. S. Wright, in his Essay on Possession, at p. 231, says: "It was formerly supposed that the mere leaving of the thing by the taker on the owner's premises for a time of itself vested a possession in the owner, so as to make a re-occupation by the taker a trespass and (*animus furandi* being present) a theft. But it seems clear that such a relinquishment is merely evidence of an abandonment, general or to the owner, more or less conclusive according to the circumstances." So in the last edition of Archbold Criminal Law, at p. 363, it is stated there is no larceny unless the "wrong-doer had between the severance and the taking away intended to abandon his wrongful possession of the article severed." In my opinion Townley's case, L. R. 1 C. C. R. 315, does not decide what is supposed. The continuity of transaction contemplated by the common law as excluding larceny may be considered from the point of view of time, act, and possession. The principal element being possession, if the thief is in continuous possession, the occurrence of an interval of time between the taking and the carrying away can of itself make no difference. Townley's case, L. R. 1 C. C. R. 315, only decides: (1) that where there is evidence of actual possession continuing, the fact that there is an interval of time between the taking and carrying away does not constitute larceny where the wrong-doer's intention is not abandoned and the transaction is in substance continuous; (2) that chattels may be in the thief's possession, though left on the owner's land (the chattels there being rabbits which were not subject of property until killed). The expressions "abandon" and "intention to abandon," found in the report of Townley's case, L. R. 1 C. C. R. 315, though not inappropriate when read with reference to the special facts of that case, are liable to misconstruction if employed in reference to such a case as that before us. Where chattels after severance are left on the property of the true owner, no matter what the wrong-doer's intention may be, he cannot escape the common-law doctrine, if his possession is not in fact continuous. Continuity of intention is not the equivalent of continuity of possession. The transaction here was not continuous, and the conviction is right.

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[1] Arguments are omitted.

[2] JOHNSON, J., and MORRIS, C. J., delivered opinions in favor of conviction, and HARRISON, O'BRIEN, and ANDREWS, JJ., concurred with the majority of the court.

HOLMES, J. I think that the solution of the question reserved in this case depends upon whether there is any evidence that the grass or hay was not in the possession of the true owner in the interval between the severance and removal. When the grass was growing it belonged to the owner of the land; but although he was in possession of it as part of the land, he was not in possession of it as a personal chattel. It first became capable of being the subject of larceny when it was severed. It is, I think, clear that where it is severed by a wrong-doer, and, as part of one continuous transaction, it is carried away by him, there is no larceny. In such a case it has never, as a personal chattel, been in the possession, actual or constructive, of the true owner. It has been continuously in the actual, though perhaps not always in the physical, possession of the wrong-doer. In the case before us the defendant, having cut the grass, left it on the lands. Beyond the severance he did no act of any kind evidencing actual possession on his part, and for two days the owner of the land had, it seems to me, precisely the same kind of possession of it as he would have had if it had been cut and left there by his own servant.

There cannot, I conceive, be constructive as distinguished from actual possession by a wrong-doer; and when he returned at the end of the period I have mentioned he would be guilty of larceny, unless he was in actual possession in the interval. There is not, however, a particle of evidence of such actual possession, and therefore I hold the conviction right. This conclusion is in strict accordance with the authorities previous to The Queen *v.* Townley, L. R. 1 C. C. R. 315, referred to by Mr. Molloy, and does not, I think, in any way conflict with that decision. In that case there was abundant evidence that the whole transaction was a continuous act, or in other words, that the wrong-doer had never been out of actual possession; and under the circumstances the fact, upon the assumption of which the case was stated, that the poachers had no intention to abandon the wrongful possession of the rabbits which they acquired, but placed them in the ditch as a place of deposit till they could conveniently remove them, was decisive in the prisoner's favor. I consider, however, that that decision has no application to the present case.

Palles, C. B. I am unable to concur with the other members of the court. In my opinion the conviction was wrong, and ought to be quashed. We all appear to agree that if the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking, and if the taking and carrying away constitute one continuous act, such taking and carrying away is not theft at common law. We also appear to agree that the rule applies as well to the grass in question here as to the rabbits in The Queen *v.* Townley, L. R. 1 C. C. R. 315, and that the reason of the rule is not that the thing taken was not at the time of the taking the property of the prosecutor, but because, at the moment at which it became that class of property which can be the subject of larceny — *i. e.* a personal chattel — it was in the possession, not of the true owner, but of the trespasser. On the other hand, I admit that although the possession of the chattel was in the trespasser by the act of taking, yet, if such possession ceased in fact, by its abandonment by the trespasser, the possession upon such cesser became constructively that of the true owner; and that if, during the continuance of such constructive possession, the trespasser again took possession, *animo furandi*, such last-mentioned taking would be larceny.

The question, then, for decision is, whether on the facts of the present case, and notwithstanding the finding of the jury on the question left to them, we can say, as a matter of law, that the cutting and carrying away did not constitute one continuous act; or, in other words, that the possession of the prisoner of the severed grass had ceased prior to its removal on the 13th August. As to what constitutes a cesser of possession, it seems clear that it cannot be said that it necessarily takes place the moment the trespasser abandons physical control over the chattel. In The Queen *v.* Townley, L. R. 1 C. C. R. 315, the rabbits were lying in a ditch for three hours during the absence of the poachers, and were consequently for that period out of their physical power and control; yet it was held that the question of the cesser or abandonment of the trespasser's possession was one not of law, but of fact; and that a verdict negativing — as the jury have here negatived — intention to abandon amounted to not guilty. The decision there, therefore, involved the determination that during the entire period whilst the rabbits lay in the ditch, they were in law in the possession, not of the true owner, but of the absent poachers, and were so by reason of the absence in the minds of the poachers of intention to abandon.

The same conclusion was arrived at in Reg. *v.* Petch, 14 Cox C. C. 116, in which the period during which the dead rabbits were hidden in a hole in the earth must have been nearly an entire day, viz. from half-past eleven on one morning to early on the following morning. I am not quite sure that I understand the exact meaning which Mr. Justice Gibson attaches to the word "effective" when he conceives it to be a principle of the common law that when the wrong-doer's actual and effective possession ceases, he cannot be deemed to be in constructive possession. If by "effective" he means something different from "actual" and for this reason distinguishes the present case from The Queen *v.* Townley, L. R. 1 C. C. R. 315, and The Queen *v.* Petch, 14 Cox C. C. 116, I am unable to follow his reasoning. If it can be said, as a matter of law, that the possession of the severed grass by the prisoner in the present case, although actual, was not "effective" so, too, should have been held the possession for a day of the trapper in The Queen *v* Petch, 14 Cox C. C. 116, and that for three hours of the poachers in The Queen *v.* Townley, L. R. 1 C. C. R. 315. On the other hand, if by "effective" he means no more than is involved in "actual," then, although I agree in his view, I cannot distinguish the present case from Townley's case, L. R. 1 C. C. R. 315, and Petch's case, 14 Cox C. C. 116. On that supposition it would not be sufficient that the facts should be such that the jury might have found that the actual possession of the prisoner had ceased. No doubt they might, but they have not done so. They have found the contrary. Petch's case, 14 Cox C. C. 116 is a clear authority that if the period which elapsed between the cutting the grass and its ultimate carrying away did not amount to more than a day, the prisoner, in the present case (having regard to the finding) would not have been guilty. But if the exact length of the interval be material, we, as distinct from the jurors, cannot determine the exact time, measured in hours or in days, the existence of which will make that larceny, which would not have been so had the interval been something less. We cannot say that if the interval be twenty-three hours it may not be, but that if it be increased to twenty-five hours, or three days, it necessarily must be larceny.

The question involved is, as decided in Townley's case, L. R. 1 C. C. R. 315, one of intention. Such a question is usually exclusively for a jury. If time be, as admittedly it is, material in determining this intention, the only periods between which the common law can recognize a distinction are between those which are and which are not reasonable. This is the view taken by Mr. Justice Stephen in his Digest (4th ed. Art. 296). "It seems," he says, "that the taking and carrying away are to be deemed to be continuous if the intention to carry away after a reasonable time exists at the time of the taking." If this be, as I think it is, the true rule, the jurors alone can, in a case such as the present, determine within which class the period of time in question here must range; and the question of reasonable time not having been left to the jury or found, considerations arising from the length of the interval cannot, as it seems to me, be relied upon. If, therefore, the conviction, under the circumstances proved, be right, so must it have been had the interval been three hours, or one day, instead of three days; and unless there be some other distinction between this and Townley's case, L. R. 1 C. C. R. 315, and Petch's case, 14 Cox C. C. 116, the present case would appear to be ruled by them. Is there, then, any distinction? I think not. It is said that here there is an absence of intention, by which I suppose is meant absence of affirmative evidence of intention in the prisoner to remain in possession. Even were this so it would not justify the judge in withdrawing from the jury the prisoner's intention; for the material thing is, not the absence of intention to retain possession, but the presence of affirmative intention to abandon. The mere act of cutting was some evidence that the prisoner cut the grass for himself, and intended to use it. He told the police constable that he (the prisoner) might as well have it as the landlord. This declaration, though made on the 11th, is some evidence of his intention at the time of the original cutting, on the 10th. It was competent, too, to the jury to have regard to the character of the act done, and to find that the reason the prisoner refrained for three days from carrying it away was that it might become dry, and that he might carry it away as hay.

Mr. Molloy, as I understand, contests the proposition laid down by Mr. Justice Stephen, to which I have already referred, and for that purpose relies mainly upon 1 Hale P. C., p. 510, and Lee *v.* Risdon, 7 Taunt. 191. In the first it is said: "If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continuated but interpolated, and so it was agreed by the Court of King's Bench, 9th Car. II., upon an indictment for stealing the lead of Westminster Abbey." This passage may mean no more than that such an act is capable of being a felony, if so found by the jury; and that the jury should so find, if they were of opinion that the act was not continuated but interpolated. In Lee *v.* Risdon, 7 Taunt. 191, the distinction drawn by Gibbs, C. J., is as to that of which felony can, and that of which it cannot, be committed. "Felony," he says, "cannot be committed of those things" (*i. e.* things attached to the freehold), "but if the thief severs the property, and instantly carries it off, it is no felony at common law. If, indeed, he lets it remain after it is severed, any time, then the removal of it becomes a felony." The true meaning, however, of these passages was determined by The Queen *v.* Townley, L. R. 1 C. C. R. 315. Martin, B., explains them in these words: "Those statements may be perfectly correct, and ought, perhaps, to be followed, in cases exactly similar in their facts, where there has been an actual abandonment of possession of the things taken; but here it is expressly found that there was no abandonment; and where the act is merely interrupted, I think it is more reasonable to hold that there is no larceny." This judgment is valuable as showing two things: (1) That the authorities relied upon by Mr. Molloy are applicable only where an actual abandonment of the thing taken has been found or admitted; (2) That the question of abandonment, in fact, depends upon intention to abandon. There, the fact admitted was that the poachers had no intention to abandon; and that is treated by Martin, B., as an express finding that there was no abandonment in fact. Bramwell, B., also treats the case as depending upon intention. "I think our decision," he says, "is consistent with the passage cited from Hale, and the *dictum* of Gibbs, C. J., referred to, which appear to me to be quite correct. If a man were unlawfully to dig his neighbor's potatoes, and from being disturbed in his work, or any other cause, were to abandon them in the place where he had dug them, and were afterwards, with a fresh intention, to come back and take them away, I think the case would be the same as if, during this interval of time, the potatoes had been locked in a cupboard by the true owner." Byles, J., in the same way treats the fact that the poachers had no intention to abandon as involving that their possession never had been abandoned in fact. Blackburn, J., says: "There is the fact that the rabbits, after being killed, were left hidden in a ditch upon the land for nearly three hours. I should myself have thought that that made no difference in the case." As to the passages cited from Lord Hale, and the *dictum* of Chief Justice Gibbs, he adds: "If we are to understand those passages in the sense put upon them by my brother Bramwell, as applying only to a case in which the wrong-doer has abandoned and lost all property and possession in the things in question, I have no quarrel with them, and they do not apply to the present case. But if those passages mean that the mere cessation of physical possession is sufficient to make the subsequent act of removal larceny, then they do apply to the present case, and in that case, great as is my respect for Lord Hale, I cannot follow him."

The clear answer, then, to the argument of Mr. Molloy, appears to me to be that if the passages he has relied upon are to be read in the sense for which he contends, they are inconsistent with, and have been overruled by The Queen *v.* Townley, L. R. 1 C. C. R. 315.

Upon the whole, I am of opinion that the decision in The Queen *v.* Townley, L. R. 1 C. C. R. 315, as applied to the present case, involves the following propositions: —

1. That the mere leaving by the prisoner of the field in which he cut the grass was not, *per se*, and irrespective of every other consideration, sufficient to make his subsequent act of removal larceny.

2. That the prisoner's omission for three days to take away the hay was evidence from which a jury might, if they thought fit, have found an abandonment by the prisoner of that possession which he had acquired by the unlawful act of severance.

3. That such question of abandonment involved the intention of the prisoner and his object in leaving the grass lying upon the field for three days.

4. That such abandonment was essential to a valid conviction; and that, in the present case, in which instead of being found it has been negatived, the conviction cannot be sustained. See Reg. *v.* Barry, 2 Cox C. C. 294.

COMMONWEALTH *v.* STEIMLING.

SUPREME COURT OF PENNSYLVANIA. 1893.

[*Reported* 27 *Atlantic Reporter*, 297.]

WILLIAMS, J.[1] It appeared on the trial that Bower, the prosecutor, was the owner of a farm which was crossed by Mahanoy Creek. Some distance up the stream coal mines were in operation, and had been for many years. The culm and waste from the mines and breaker, which had been thrown into, or piled upon the bank of, the creek, had been carried down the stream by the current and the floods, and deposited in the channel and along the shores in considerable quantities. This material, having been abandoned by its original owners, belonged to him on whose land the water left it. The water, dropping the heavy pieces first, and carrying the smaller particles and dust along in the current, served as a screen; and, as the result of this process, considerable quantities of coal suitable for burning were lodged along the channel and the banks of the stream, throughout its course over the prosecutor's farm. The defendant, descending the stream with a flatboat, entered upon the lands of Bower, and began to gather coal from the surface. He was provided with a scoop or shovel made of strong wire or iron rods, with which he gathered up the coal. The sand and gravel passed through the meshes of the scoop, leaving the pieces of coal within it. When the gravel was all sifted out, the cleaned coal was emptied upon the flatboat. This process was continued until a boat-load was obtained. The boat was then towed or pushed to some bins on the shore opposite to Bower's house, and the coal was transferred from the boat to the bins. This was repeated until from eight to twelve tons of coal had been gathered, cleaned, deposited on the boat, transported to the bins, and unloaded. This coal was afterwards delivered to purchasers, or taken for consumption, from the bins. Here was a taking with intent to carry away and convert, a carrying away, and an actual conversion, which, the commonwealth held, sustained the indictment for larceny. The learned judge, however, instructed the jury that the process of collecting, cleaning, loading upon the flatboat, transporting to the bins, and unloading the coal into them, must be regarded as one continuous act, like the act of him who tears a piece of lead from a building and carries it off, or who, passing an orchard, plucks fruit and takes it away, and that the defendant was therefore a trespasser only. The distinction in the mind of the learned judge was that between real and personal estate. The coal lying upon the surface he held to be real estate. The lifting it up in the shovel was, on this theory, a severance, which forcibly changed its character, and made it personal. The loading into the flatboat, the transportation to the bins, and unloading of the boat, all of which acts were done within the lines of the prosecutor's land, and occupied hours of time for each boat-load, were so connected with the severance as to make but a single act. For this reason he held that the defendant was guilty of a trespass only. The common law did distinguish between things that are connected with or savor of the real estate and those that are personal goods. An apple growing upon a tree was connected with the land by means of the tree that bore it, and so held to partake of the nature of the land, and to be real estate. One who plucked it from the tree, and at once ate or carried it away, was therefore a trespasser; but if he laid it down, and afterwards carried it away, so that the taking and the asportation were not one and the same act, then, if the carrying away was done *animo furandi*, the elements of larceny were present. Blackstone tells us, in volume 4, p. 233, of the Commentaries, that larceny cannot be committed of things that savor of the realty, because of "subtility in the legal notions of our ancestors." He then explains the subtile distinction as follows: "These things [things that savor of the realty] were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable; and if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from their proprietor in their newly acquired state of mobility." But he explains that if the act of severance and that of carrying away be separated, so that they do not constitute "one and the same continued act," the subtile distinction between personal goods and those that savor of the real estate ceases to protect the wrong-doer from a criminal prosecution, and a charge of larceny can be sustained. The question whether this coal, lying loose upon the surface, like other drift of the stream, was real or personal estate, does not seem to have been raised in the court below, and it is not before us. The real question presented is whether this case, upon its facts, is one for the application of the common-law rule. Have we here a severance and an asportation that constitute "one and the same continuous act?" If the picking of the coal from the surface be treated as an act of severance, we have next the act of cleaning and sifting; then the deposit of the cleaned coal upon the flatboat, little by little; then the transportation of the boat-load to the bins; then the process of shovelling the coal from the boat into the bins. The acts, occupying considerable time for each boat-load, were all done within the inclosures of the prosecutor. It is as though one should come with team and farm-wagon into his neighbor's corn-field, and pluck the ears, load them into the wagon, and, when the wagon would hold no more, draw the corn away to his own corn-house, and then return again, and continue the process of harvesting in the same manner until he had transferred his neighbor's crop to his own cribs. If such acts were done under a *bona fide* claim of title to the crop, they would not amount to larceny, but, if done *animo furandi,* all the elements of larceny would be present. In the case before us, it is conceded that the coal belonged to Bower, and was in his possession as part of his real estate. The defendant entered his lands for the purpose of collecting coal, and carrying it away. He makes no *bona fide* claim of title; no offer to purchase; sets up no license; but rests on the proposition that, like the man who plucks an apple from a tree, and goes his way, he is liable only as a trespasser. If this be true, he could gather the coal from Bower's land as often as the stream made a sufficient deposit to justify the expenditure of time necessary to gather, clean. transport, and put it in bins. Upon the same principle, he might gather all the crops growing on Bower's farm, as they matured, and, by hauling each load away when it was made up, defend against the charge of larceny on the ground that the gathering from the tree, the stalk, or the hill, the loading into wagons, and the carrying of the loads away, though occupying hours for each load, and many days for the crop, was "one and the same continuous act" of trespass. We cannot agree to such an extension of the common-law rule, but are of the opinion that this case should have gone to the jury, on the existence of the *animo furandi.*

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[1] Part only of the opinion is given.

REGINA *v.* RILEY.

CROWN CASE RESERVED. 1853.

[*Reported* 6 *Cox C. C.* 88; *Dearsly, C. C.* 149.]

AT the General Quarter Sessions of the Peace for the county of Durham, held at the city of Durham, before Rowland Burdon, Esq., Chairman, on the 18th day of October, in the year of our Lord 1852, the prisoner was indicted for having, on the 5th day of October, 1852, stolen a lamb, the property of John Burnside. The prisoner pleaded not guilty. On the trial it was proved that on Friday, the 1st day of October, in the year of our Lord 1852, John Burnside, the prosecutor, put ten white-faced lambs into a field in the occupation of John Clarke, situated near to the town of Darlington. On Monday, the 4th day of October, the prisoner went with a flock of twenty-nine black-faced lambs to John Clarke, and asked if he might put them into Clarke's field for a night's keep, and upon Clarke's agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs. At half-past seven o'clock in the morning of Tuesday, the 5th day of October, the prosecutor went to Clarke's field, and in counting his lambs he missed one, and the prisoner's lambs were gone from the field also. Between eight and nine o'clock in the morning of the same day, the prisoner came to the farm of John Calvert, at Middleton St. George, six miles east from Darlington, and asked him to buy twenty-nine lambs. Calvert agreed to do so, and to give 8*s.* apiece for them. Calvert then proceeded to count the lambs and informed the prisoner that there were thirty instead of twenty-nine in the flock, and pointed out to him a white-faced lamb; upon which the prisoner said, "If you object to take thirty, I will draw one." Calvert, however, bought the whole and paid the prisoner £12 for them. One of the lambs sold to Calvert was identified by the prosecutor as his property and as the lamb missed by him from Clarke's field. It was a half-bred, white-faced lamb, marked with the letter "T," and similar to the other nine of the prosecutor's lambs. The twenty-nine lambs belonging to the prisoner were black-faced lambs. On the 5th of October, in the afternoon, the prisoner stated to two of the witnesses that he never had put his lambs into Clarke's field, and had sold them on the previous afternoon, for £11 12*s.*, to a person on the Barnard Castle road, which road leads west from Darlington.

There was evidence in the case to show that the prisoner must have taken the lambs from Clarke's field early in the morning, which was thick and rainy.

It was argued by the counsel for the prisoner, in his address to the jury, that the facts showed that the original taking from Clarke's field was by mistake; and if the jury were of that opinion, then, as the original taking was not done *animo furandi,* the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted. The chairman, in summing up, told the jury that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by Calvert, he should rule that in point of law the taking occurred when it was so pointed out to the prisoner and sold by him to Calvert, and not at the time of leaving the field. The jury returned the following verdict: "The jury say that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him."

The prisoner was then sentenced to six months' hard labor in the house of correction at Durham; and being unable to find bail, was thereupon committed to prison until the opinion of this court could be taken upon the question whether Charles Riley was properly convicted of larceny.[1]

Pollock, C. B. We are all of opinion that the conviction is right. The case is distinguishable from those cited. R. *v.* Thristle decides only that if a man once gets into rightful possession, he cannot by a subsequent fraudulent appropriation convert it into a felony. So in R. *v.* Thurborn, in the elaborate judgment delivered by my brother Parke on behalf of the court, of which I was a member, the same rule is laid down. It is there said that the mere taking up of a lost chattel to look at it would not be a taking possession of it; and no doubt that may be done without violating any social duty. A man may take up a lost chattel and carry it home, with the proper object of endeavoring to find the owner; and then afterwards, if he yields to the temptation of appropriating it to his own use, he is not guilty of felony. In Leigh's case, also, the original taking was rightful, but here the original taking was wrongful. I am not desirous of calling in aid the technicality of a continuing trespass; and I think this case may be decided upon the ground either that there was no taking at all by the prisoner in the first instance or a wrongful taking, and in either case, as soon as he appropriates the property, the evidence of felony is complete.

Parke, B. I think that this case may be disposed of on a short ground. The original taking was not lawful, but a trespass, upon which an action in that form might have been founded; but it was not felony, because there was no intention to appropriate. There was, however, a continuing trespass up to the time of appropriation, and at that time, therefore, the felony was committed. Where goods are carried from one county to another they may be laid as taken in the second county, and the difference between this and Leigh's case, as well as the others cited, is that the original taking was no trespass. It was by the implied license of the owner, and the same thing as if he had been entrusted by the prosecutor with the possession of the goods.

Williams, Talfourd, and Crompton, JJ., concurred.

Conviction affirmed.

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[1] Argument of counsel is omitted.

STATE *v.* COOMBS.

SUPREME JUDICIAL COURT OF MAINE. 1868.

[*Reported* 55 *Maine*, 477.]

DICKERSON, J.[1] Exceptions. The prisoner was indicted for the larceny of a horse, sleigh, and buffalo robes. The jury were instructed that, if the prisoner obtained possession of the team by falsely and fraudulently pretending that he wanted it to drive to a certain place, and to be gone a specified time, when in fact he did not intend to go to such place, but to a more distant one, and to be absent a longer time, without intending at the time to steal the property, the team was not lawfully in his possession, and that a subsequent conversion of it to his own use, with a felonious intent while thus using it, would be larceny.

It is well settled that where one comes lawfully into possession of the goods of another, with his consent, a subsequent felonious conversion of them to his own use, without the owner's consent, does not constitute larceny, because the felonious intent is wanting at the time of the taking.

But how is it when the taking is fraudulent or tortious, and the property is subsequently converted to the use of the taker with a felonious intent? Suppose one takes his neighbor's horse from the stable, without consent, to ride him to a neighboring town, with the intention to return him, but subsequently sells him and converts the money to his own use, without his neighbor's consent, is he a mere trespasser, or is he guilty of larceny? In other words, must the felonious intent exist at the time of the original taking, when that is fraudulent or tortious, to constitute larceny?

When property is thus obtained, the taking or trespass is continuous. The wrong-doer holds it all the while without right, and against the right and without the consent of the owner. If at this point no other element is added, there is no larceny. But if to such taking there be subsequently superadded a felonious intent, that is, an intent to deprive the owner of his property permanently without color of right, or excuse, and to make it the property of the taker without the owner's consent, the crime of larceny is complete. "A felonious intent," observes Baron Parke, in Regina *v.* Holloway, 2 C. & K., 942, "means to deprive the owner, not temporarily, but permanently of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

The case of Regina *v.* Steer, 2 C. & K., 988, is in harmony with this doctrine. The prosecutor let the prisoner have his horse to sell for him; he did not sell it, but put it at a livery stable. The prosecutor directed the keeper of the stable not to give up the horse to the prisoner, and told the prisoner he must not have the horse again; to which the prisoner replied, "Well." The prisoner got possession of the horse by telling a false story to the servant of the keeper of the stable, and made off with him. The case was reserved, and the court held the prisoner guilty of larceny. Commonwealth *v.* White, 11 Cush. 483.

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[1] The opinion only is given; it sufficiently states the case.

In the case at bar, the prisoner obtained possession of the property by fraud. This negatives the idea of a contract, or that the possession of the prisoner was a lawful one when he sold the horse. He was not the bailee of the owner, but was a wrong-doer from the beginning; and the owner had a right to reclaim his property at any time. It has been decided that when a person hires a horse to go to a certain place, and goes beyond that place, the subsequent act is tortious and that trover may be maintained, on the ground of a wrongful taking and conversion. Morton *v.* Gloster, 46 Maine, 520.

In contemplation of law, the wrongful act was continuous, and when to that act the prisoner subsequently added the felonious intent, that is, the purpose to deprive the owner of his property permanently, without color of right or excuse, and to convert it to his own use without the consent of the owner, the larceny became complete from that moment. The color of consent to the possession obtained by fraud, does not change the character of the offence from larceny to trespass or other wrongful act. In such case it is not necessary that the felonious intent should exist at the time of the original taking to constitute larceny, the wrongful taking being all the while continuous.

It is to be observed that this principle does not apply in cases where the owner parted with his property, and not the possession merely, as in the case of a sale procured by fraud or false pretences. In such instances there is no larceny, however gross the fraud by which the property was obtained. Mawrey *v.* Walsh, 8 Cowen, 238; Ross *v.* The People, 5 Hill, 294. "It is difficult to distinguish such a case from larceny," remarks Mr. Justice Cowen, in Ross *v.* The People; "and were the question *res nova* in this court, I, for one, would follow the decision in Rex *v.* Campbell, 1 Mood. Cr. Cases, 179. The decisions, however, are the other way, even in England, with the single exception of that case, and they have long been followed here. There is nothing so palpably absurd in this as to warrant our overruling them."

We are unable to discover any error in the instructions of the presiding judge. *Exceptions overruled.*

Judgment for the State.

KENT, WALTON, BARROWS, DANFORTH and TAPLEY, JJ., concurred.[1]

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[1] *Acc.* Weaver *v.* State, 77 Ala. 26; Com. *v.* White, 11 Cush. 483. — ED.

WARD *v.* PEOPLE.

SUPREME COURT OF NEW YORK. 1842.

[*Reported* 3 *Hill*, 395.]

ERROR to the Oneida general sessions, where Ward was convicted of petit larceny, second offence. The indictment charged the prisoner with having stolen twenty-five pounds of butter, the property of one John Flagg. On the trial Flagg testified that he bought the butter in question of the captain of a canal boat. The prisoner's counsel proposed to ask the witness if he, or if he and the canal boat captain together, did not steal the butter. This question was objected to, and the objection sustained, whereupon the prisoner's counsel excepted.[1] It appeared in the course of the trial that the butter stolen from Flagg had been previously stolen from firkins on a canal boat, and the evidence tended strongly to connect Flagg with the larceny.

W. M. Allen, for the plaintiff in error.

W. C. Noyes, for the people.

By the Court, NELSON, C. J. The question put to Flagg was properly overruled. If the question had been answered in the affirmative, the fact would have been immaterial, because possession of property in the thief is sufficient to make it the subject of larceny; and the title may be laid either in the owner or the thief. Thus if A. steal goods from B., and C. afterwards steal the same goods from A., C. is a felon both as to A. and B. 2 East's Cr. L. 654; 2 Russ. 156; 1 Hale's P. C. 507.[2]

ANONYMOUS.

KING'S BENCH. 1406.

[*Reported Year Book* 7 *Hen. IV.*, 43, *pl.* 9.]

A MAN was appealed of larceny in Middlesex, while the felony was done in London. And the court was informed that the appellee after the felony done had carried the goods into the county of Middlesex. And the court said that for that reason the appeal was well taken, for when a man robs another of his goods, and carries them into divers counties, he commits the robbery in each county, and the appeal is maintainable in whatever county the plaintiff will. And note that the felon with the mainor was taken in London, and the body and the mainor were made come before the king.

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[1] Only so much of the case as relates to this exception is given.

[2] Affirmed 6 Hill, 144, Foster, Sen., dissenting on this point. See *acc.* Regina *v* Wade, 1 C. & K. 739; Com. *v.* Finn, 108 Mass. 466. — ED.

ANONYMOUS.

Exchequer Chamber. 1489.

[*Reported Year Book* 4 *Hen. VII.*, 5, *pl.* 1.]

One was arraigned upon an indictment, for that he had stolen certain goods, etc., in the county of Surrey. And the defendant said that he was indicted for taking the same goods on the same day in the county of Middlesex, and was acquitted, which was the same felony. And prayed judgment, if for that, etc.

Fisher. It is no plea, because it shall be taken most beneficially for the king, and they may have been stolen twice well enough.

Frowike, to the contrary. For where goods are stolen in one county, and carried into another county, he may be indicted in each county, and shall have judgment of life; and therefore it is reason that if he should be acquitted in one county, he should be acquitted in the other county. And if one should be beaten in one county, and after die in another county, and indictment in both counties, it is reason that if he should be acquitted in one county that should help him in the other county, etc.

Hussey, C. J. It seems no plea. And as I understand, trespass for battery committed in one county cannot be found in another county on pain of attaint; and the same law of goods taken and carried out of the county where they were taken, it can be found only in the county where the taking occurred, and that on pain of attaint. But the law is otherwise in appeal; for there he may bring an appeal in each county where the goods are carried. And this has been a diversity, for the appeal is to recover his goods, and affirms property continually in the party, etc., but it is otherwise of trespass; for it is not to recover the goods, but damages for the goods, etc. And, sir, I take it, if one steals my goods, and another steals the goods from him, I shall have an appeal against the second felon; but it is otherwise of trespass. And notwithstanding the appeal lies in each county where the goods are carried, still he cannot be indicted except where the taking was made, for the indictment is not to have the goods, etc.; and that has been the diversity between indictment and appeal. And so here, notwithstanding he submits that it is the same felony, that cannot be tried; for if it should be tried, it ought to be tried by both counties, and here neither of them can give evidence to the other, for the takings are so several that one cannot give evidence nor notice to the other; and therefore, notwithstanding mischief shall happen to the party, such mischief shall be borne; for in one county, etc., without cause; and yet he ought to answer.

Fairfax, J., agreed to the diversity between appeal, indictment, and trespass, etc., and said that the allegation that it is the same felony could not be tried by both counties when he is acquitted in one county, and those of that county cannot give evidence of any felony in that county.

And then *Mordant* pleaded the plea, and prayed that it be allowed; and as to the felony, not guilty.

And the Chief Justice said that he should have the plea, because it is matter in law, and the other matter in fact. *Et tota Curia contra eum.*

And it was held by all the justices and barons that in a writ of trespass in Middlesex it is no plea to say that he has recovered for a trespass committed in the county of Surrey, because it could not be understood as the same trespass; but some at the bar held that it is different in felony, because it is felony in every county where the goods are, or come, etc.

Frowike said: For the same reason that they may find him guilty in appeal for a felony in another county, for the same reason they shall acquit of felony conceived in another county. R. See T. 25 E. 3 f. 44. A. 8 H. 5.[1]

REX *v.* POWERS.

CROWN CASE RESERVED. 1832.

[*Reported* 1 *Moody C. C.* 349.]

THE prisoner was tried and convicted before Mr. Selwyn, K. C., at the spring Assizes for the County of Dorset in the year 1832, and ordered to be transported for seven years; but the execution of the sentence was respited in order that the opinion of the judges might be taken on the case.

The indictment charged the prisoner with stealing at Dorchester, in the county of Dorset, a quantity of wearing apparel, the property of Thomas Cundy. The things had been taken by the prisoner from a box of the prosecutor's at St. Helier's in the island of Jersey, while the prosecutor was absent at his work at a short distance, and without his leave; they were shortly afterwards found in the possession of the prisoner at Weymouth, in the county of Dorset, where he had been apprehended on another charge.

A doubt occurred whether the original taking was such whereof the common law could take cognizance; and if not whether the case fell within the statute 7 & 8 G. IV. c. 29, s. 76; or in other words whether the island of Jersey could [be] considered as part of the United Kingdom. 2 Russell, 175. If the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted in any county into which he may carry them. 3 Inst. 113; 1 Haw. P. C. 33, s. 92. A similar exception prevailed formerly where the original taking was in Scotland or Ireland; and it appears to have been holden that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods. Rex *v.* Anderson and others, Carlisle summer Assizes, 1763; and before the judges, November, 1763; 2 East, 772, c. 16, s. 156.

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[1] See 22 Lib. Ass. pl. 32. — ED.

This case was considered at a meeting of all the judges (except Lord Lyndhurst, C. B., and Taunton, J.) in Easter Term, 1832; and they held unanimously that the conviction was wrong and that the case was not within 7 & 8 G. IV. c. 29, s. 76.[1]

PEOPLE *v.* GARDNER.

SUPREME COURT OF NEW YORK. 1807.

[*Reported* 2 *Johnson*, 477.]

THE prisoner was indicted and convicted of felony at the sessions in Washington County, for stealing a horse. On the trial it appeared that the original taking of the horse was in the State of Vermont, but that the prisoner was apprehended in Washington County, with the horse in his possession. The question was submitted to the court, whether the prisoner could be tried and punished in this state for the felony.

Per Curiam. We are of opinion that the prisoner cannot be tried for this offence in this state. When the original taking is out of the jurisdiction of this state, the offence does not continue and accompany the possession of the thing stolen, as it does in the case where a thing is stolen in one county, and the thief is found with the property in another county. 2 East's Pleas of the Crown, 774. The prisoner can be considered only as a fugitive from justice, from the State of Vermont.

[illegible]

COMMONWEALTH *v.* HOLDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1857.

[*Reported* 9 *Gray*, 7.]

INDICTMENT for stealing at Milford in this county goods of Henry W. Dana. At the trial in the Court of Common Pleas there was evidence that the defendant broke and entered the shop of said Dana at

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[1] *Acc.* Case of the Admiralty, 13 Coke, 51; Rex *v.* Anderson, 2 East P. C. 772; Reg. *v.* Debruiel, 11 Cox C. C. 207; Reg. *v.* Carr, 15 Cox C. C. 131 *n.* — ED.

Smithfield in the State of Rhode Island, and stole the goods mentioned in the indictment, and brought them into this county. The defendant asked that the jury might be instructed that the indictment could not be maintained, because the courts of this state could not take cognizance of a larceny committed in another state. But Mellen, C. J., refused so to instruct the jury, and instructed them that the evidence, if believed, was sufficient to support the indictment. The defendant being convicted alleged exceptions.

G. F. Verry, for the defendant.

J. H. Clifford (Attorney General), for the Commonwealth.

SHAW, C. J. A majority of the court are of opinion that this case must be considered as settled by the case of Commonwealth *v.* Uprichard, 3 Gray, 434, and the principles stated and the precedents cited. Though to some extent these colonies before the Revolution were distinct governments and might have different laws, it was not unreasonable, as they all derived their criminal jurisprudence from the English common law, to regard the rule applicable to a theft in an English county of goods carried by the thief into another as analogous, and adopt it. We are of opinion that Massachusetts did adopt it, and this is established by judicial precedent, before and since the Revolution, and is now settled by authority as the law of this state.

THOMAS, J. The real question in this case is, whether the defendant can be indicted, convicted, and punished in this Commonwealth for a larceny committed in the State of Rhode Island. If it were a new question, it would be enough to state it. The obvious, the conclusive answer to the indictment would be that the offence was committed within the jurisdiction of another, and, so far as this matter is concerned, independent state, of whose law only it was a violation, and of which its courts have exclusive cognizance. By the law of that state the offence is defined and its punishment measured; by the law which the defendant has violated he is to be tried. Whether the acts done by him constitute larceny, and, if so, of what degree, must be determined by that law. Its penalties only he has incurred; its means of protection and deliverance he may justly invoke, and especially a trial by a jury of his peers in the vicinage where the offence was committed.

This obvious view of the question will be found upon reflection, I think, to be the only one consistent with the reasonable security of the subject or the well-defined relations of the states. It is well known that the laws of the states upon the subject of larceny materially differ. In most of them the common law of larceny has been greatly modified by statutes. The jurisprudence of all is not even based on the common law; in several the civil law obtains.

In cases where a difference of law exists, by which law is the defendant to be judged, — the law where the offence (if any) was committed, or where it is tried? For example, the defendant is charged with taking with felonious intent that which is parcel of the realty, as the gearing of a mill or fruit from a tree. By the St. of 1851, c. 151, the act is larceny in this Commonwealth. If it appears that in the state where the act was done it was, as under the common law, but a trespass, which law has the defendant violated and by which is he to be tried? Or suppose the defendant to be charged with the stealing of a slave, — a felony in the state where the act is done, but an offence not known to our laws. The difficulty in both cases is the same. You have not only conflicting jurisdictions, but different rules of conduct and of judgment.

But supposing the definitions of the offence to be the same in the two states, the punishments may be very different. Where such difference exists, which penalty has the defendant justly incurred, and which is he to suffer? For example, the offence is punishable by imprisonment in Rhode Island, say for a year; in this state the same offence is punishable by imprisonment from one to five years; is the defendant liable to the heavier punishment? Or suppose he has been convicted in Rhode Island, and in consideration of his having indemnified the owner for the full value of the goods taken, his punishment has been more mercifully measured to him, can he, after he has suffered the punishment, and because the goods were, after the larceny, brought into this state, be made to suffer the penalty of our law for the same offence? Or suppose him to have been convicted in Rhode Island and a full pardon extended to him, can he be tried and convicted and punished here?

Again: the power to indict, convict, and punish the offence in this state proceeds upon the ground that the original caption was felonious. If the original taking was innocent or but a trespass, the bringing into this state would not constitute a larceny. You must, therefore, look at the law of the state where the first caption was made. And how is the law of another state to be ascertained? What is the law of another state is a question of fact for the jury. The jury in this way are in a criminal case made not only to pass upon the law, but to pass upon it as a matter of evidence, subject, strictly speaking, neither to the direction nor the revision of the court.

Again: the defendant is indicted here for the larceny committed in Rhode Island: while in custody here awaiting his trial, he is demanded of the Executive of this state by the Executive of Rhode Island as a fugitive from the justice of that state, under the provisions of the Constitution of the United States, art. 4, § 2, and the U. S. St. of 1793, c. 45. Is he to be tried here, or surrendered up to the state where the offence was committed, and tried there? Or if he has been already tried and convicted and punished in this state, is he to be sent back to Rhode Island to be tried and punished again for the same offence? And would his conviction and punishment here be any answer to the indictment there? Or if he has been fully tried and acquitted here, and then demanded by the Executive of Rhode Island, is he, upon requisition, to be sent to that state to be again tried, to be twice put in jeopardy for the same offence? It is quite plain no ground in law would exist for a refusal to surrender.

The defendant was indicted for larceny, not for the offence of bringing stolen goods into the Commonwealth. He was, under the instruction of the presiding judge, tried for the larceny in Rhode Island, was convicted for the larceny in Rhode Island, and must be punished, if at all, for the larceny in Rhode Island. And under the rule given to the jury is presented a case where, for one and the same moral act, for one and the same violation of the rights of property, the subject may be twice convicted and punished. Nay, more, if a man had stolen a watch in Rhode Island and travelled with it into every state of the Union, he might, under the rule given to the jury, if his life endured so long, be indicted and punished in thirty-two states for one and the same offence.

And it is well to observe that it is the retention of the property which is the cause of the new offence, and the carrying of it from the place of caption into another state. If the defendant had stolen property in Rhode Island and consumed or destroyed it, and then had removed to Massachusetts, but one offence would have been committed, and that in Rhode Island.

Such are some of the more obvious difficulties attending the position that an offence committed in one state may be tried and punished in another. The doctrine violates the first and most elementary principles of government. No state or people can assume to punish a man for violating the laws of another state or people. The surrender of fugitives from justice, whether under the law of nations, treaties with foreign powers, or the provisions of the Constitution of the United States, proceeds upon the ground that the fugitive cannot be tried and punished by any other jurisdiction than the one whose laws have been violated. Even in cases of the invasion of one country by the subjects of another, it is the violation of its own laws of neutrality that the latter country punishes, and not the violation of the laws of the country invaded. The exception of piracy is apparent rather than real. Piracy may be punished by all nations because it is an offence against the law of nations upon the seas, which are the highways of nations.

The ruling of the learned Chief Justice of the Common Pleas was, I may presume, based upon the decisions of this court in Commonwealth *v.* Cullins, 1 Mass. 116, and Commonwealth *v.* Andrews, 2 Mass. 14.

It is certainly the general duty of the court to adhere to the law as decided. Especially is this the case where a change in the decision would impair the tenure by which the rights and property of the subject are held. But even with respect to these, where it is clear a case has been decided against the well settled principles of law and of reason, it is the duty and the practice of the courts to revise such decision, and to replace the law on its old and solid foundation. This is peculiarly the duty of the courts where such decision works its injustice by impairing the personal rights of the citizen, or by subjecting him to burdens and penalties which he never justly incurred.

In my judgment, the courts of this Commonwealth have not, and never had, under the Constitution of the United States or otherwise, the rightful power to try a man for an offence committed in another state. It is in vain, it seems to me, to attempt to preserve and make rules of conduct decisions founded upon wholly erroneous views of the relations which the states of the Union bear to each other under the Constitution, and in conflict with well settled principles of constitutional and international law.

I should be content to rest my dissent from the judgment of the court in the case at bar upon the principles affirmed in the recent case of Commonwealth *v.* Uprichard, 3 Gray, 434. In effect that case overrules, as its reasoning thoroughly undermines, the earlier cases. They cannot stand together.

But as the decision in the case at bar rests upon the authority of the cases in the first and second of Massachusetts Reports, it may be well to examine with care the grounds upon which they rest. Such an examination will show, I think, not only that the cases were put upon erroneous views as to the relation of the states, but that they were also unsound at common law.

In the case of Commonwealth *v.* Cullins, a jury trial where three judges of the court were present, the evidence showing that the goods were taken in the State of Rhode Island, Mr. Justice Sedgwick, who charged the jury, said that "the court were clearly of opinion that stealing goods in one state and conveying stolen goods into another state was similar to stealing goods in one county and conveying the stolen goods into another, which was always holden to be felony in both counties." Whatever the points of similarity, there was this obvious and vital difference, to wit, that conviction in one county was a bar to conviction in another, and that conviction in one state is no bar to conviction in another state.

It was a doctrine of the common law that the asportation of stolen goods from one county to another was a new caption and felony in the second county, — a legal fiction devised for greater facility in convicting the offender where it was uncertain where the first caption took place. The foundation of the rule was that the possession of the owner continued, and that every moment's continuance of the trespass may constitute a caption as well as the first taking. But in what respect was the taking in one state and conveying into another state similar to the taking in one county and conveying into another county? It could only be "similar" because the legal relation which one state bears to another is similar to that which one county bears to another; because, under another name, there was the same thing. If a man is to be convicted of crime by analogy, the analogy certainly should be a close one. Here it was but a shadow. In the different counties there was one law, one mode of trial, the same interpretation of the law, and the same punishment. The rule, mode of trial, and jurisdiction were not changed.

The states of the Union, it is quite plain, hold no such relation to each other. As to their internal police, their law of crimes and punishments, they are wholly independent of each other, having no common law and no common umpire. The provision indeed in the Constitution of the United States for surrendering up fugitives from justice by one state to another is a clear recognition of the independence of the states of each other in these regards. It excludes the idea of any jurisdiction in one state over crimes committed in another, and at the same time saves any necessity or reason for such jurisdiction. Nor is there any provision in the Constitution of the United States which impairs such independence, so far as the internal police of the states is concerned. On the other hand, the widest diversity exists in the institutions, the internal police, and the criminal codes of the several states, some of them, as Louisiana and Texas, having as the basis of their jurisprudence the civil and not the common law. In the relation which Louisiana holds to this State can any substantial analogy be found to that which Surrey bears to Middlesex?

An analogy closer and more direct could have been found in the books when Commonwealth *v.* Cullins was decided. It was that of Scotland to England, subject both to one crown and one legislature; yet it had been decided that when one stole goods in Scotland and carried them to England, he could not be convicted in the latter country. Rex *v.* Anderson (1763), 2 East P. C. 772; 2 Russell on Crimes (7th Amer. ed.), 119. Or an analogy might have been found in the cases of goods stolen on the high seas and brought into the counties of England, of which the courts of common law refused to take cognizance because they were not felonies committed within their jurisdiction. 1 Hawk. c. 33, § 52; 3 Inst. 113. In these cases a test would have been found, applicable to the alleged larceny of Cullins, to wit, the offence was not committed in a place within the jurisdiction of the court, but in a place as foreign to their jurisdiction, so far as this subject-matter was concerned, as England or the neighboring provinces. The case of Commonwealth *v.* Cullins has no solid principle to rest upon.

The case of Commonwealth *v.* Andrews, two years later, may be held to recognize the rule laid down in Commonwealth *v.* Cullins, though it was an indictment against Andrews as the receiver of goods stolen by one Tuttle in New Hampshire; and though there is, at the least, plausible ground for saying that there was a new taking by Tuttle at Harvard in the county where the defendant was indicted and tried. Indeed, Mr. Justice Parker takes this precise ground; though he adds that "the common-law doctrine respecting counties may well be extended by analogy to the case of states united, as these are, under one general government." If that union was with reference to or concerned the internal police or criminal jurisprudence of the several

States; if it was not obviously for other different, distinct, and well defined purposes; and if we could admit the right of the court to extend by analogy the provisions of the criminal law and so to enlarge its jurisdiction, — there would be force in the suggestion. As it is, we must be careful not to be misled by the errors of wise and good men.

Judge Thatcher puts the case wholly on the felonious taking at Harvard.

Mr. Justice Sedgwick, though having the same view as to the taking at Harvard, does not rest his opinion upon it, but upon the ground that the continuance of the trespass is as much a wrong as the first taking. This doctrine applies as well where the original caption was in a foreign country as in another state of the Union. If you hold that every moment the thief holds the property he commits a new felony, you may multiply his offences *ad infinitum;* but in so carrying out what is at the best a legal fiction, you shock the common-sense of men and their sense of justice. Mr. Justice Sedgwick will not admit the force of the objection that the thief would be thus twice punished, but regards with complacency such a result. But as we are to presume that the punishment is graduated to the offence, and, as far as punishment may, expiates the wrong, the mind shrinks from such a consequence. But saying that whatever he might think upon this question if it were *res integra*, he puts his decision upon the case of Paul Lord, decided in 1792, and that of Commonwealth *v.* Cullins.

Chief Justice Dana relies upon the cases before stated and a general practice, and also upon the principle that every moment's felonious possession is a new caption.

Such was the condition of the law in this state when the case of Commonwealth *v.* Uprichard came before the court. In that case the original felonious taking was in the province of Nova Scotia. The bringing of the stolen goods into this Commonwealth was held not to be a larceny here. But if it be true that every act of removal or change of possession is a new caption and asportation, that every moment's continuance of the trespass is a new taking, — if this legal fiction has any life, it is difficult to see why the bringing of the goods within another jurisdiction was not a new offence. No distinction in principle exists between this case and a felonious taking in another state and bringing into this. So far as the law of crimes and punishments is concerned, the states are as independent of each other as are the States and the British Provinces.

The case of Commonwealth *v.* Uprichard rests, I think immovably, upon the plain grounds that laws to punish crime are local and limited to the boundaries of the States which prescribe them; that the commission of a crime in another State or country is not a violation of our law, and does not subject the offender to any punishment prescribed by our law. These are principles of universal jurisprudence, and as sound as they are universal.

It is sometimes said that after all the offender is only tried and convicted for the offence against our laws. This clearly is not so. It is only by giving force to the law of the country of the original caption that we can establish the larceny. It is the continuance of the caption felonious by the law of the place of caption. In the directions given to the jury such effect is given to the laws of Rhode Island. The jury were instructed that if the defendant broke and entered into the shop of Henry W. Dana in Smithfield in Rhode Island and thence brought the goods into this county, the indictment could be maintained. The felonious taking in Rhode Island is the inception and groundwork of the offence. The proceeding is in substance and effect but a mode of enforcing the laws of and assuming jurisdiction over offences committed in another state.

For the reasons thus imperfectly stated, I am of opinion that the instructions of the Court of Common Pleas were erroneous, that the exceptions should be sustained, the verdict set aside, and a new trial granted. *Exceptions overruled.*

[illegible]

STANLEY *v.* STATE.

Supreme Court of Ohio. 1873.

[*Reported* 24 *Ohio State*, 166.]

McIlvaine, J.[1] At the November term, 1873, of the Court of Common Pleas of Cuyahoga County, the plaintiff in error, William Stanley, was convicted of the crime of grand larceny, and sentenced for a term of years to the penitentiary.

The indictment upon which he was convicted charged "that William Stanley, late of the county aforesaid, on the twentieth day of June, in the year one thousand eight hundred and seventy-three, at the county aforesaid, with force and arms," certain silverware, "of the goods and chattels and property of George P. Harris, then and there being, then and there unlawfully and feloniously did steal, take, and carry away," etc.

The following facts were proven at the trial: 1. That the goods described in the indictment belonged to Harris, and were of the value of one hundred and sixty-five dollars. 2. That they were stolen from Harris on the 20th of June, 1873, at the city of London, in the dominion of Canada. 3. That they were afterward, on the 26th day of same month, found in the possession of the defendant, in said county of Cuyahoga. It is also conceded that, in order to convict, the jury must have found that the goods were stolen by the defendant in the dominion of Canada, and carried thence by him to the State of Ohio.

Upon this state of facts, was the prisoner lawfully convicted? In other words, if property be stolen at a place beyond the jurisdiction of this state and of the United States, and afterward brought into this state by the thief, can he be lawfully convicted of larceny in this state?

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[1] The opinion only is given; it sufficiently states the case.

In view of the free intercourse between foreign countries and this state, and the immense immigration and importation of property from abroad, this question is one of very great importance; and I may add that its determination is unaided by legislation in this state.

In resolving this question we have been much embarrassed by a former decision of this court, in Hamilton *v.* The State, 11 Ohio, 435. In that case it was held by a majority of the judges that a person having in his possession in this state property which had been stolen by him in another state of the Union, might be convicted here of larceny.

The decision appears to have been placed upon the ground "that a long-sustained practice, in the criminal courts of this state, had settled the construction of the point, and established the right to convict in such cases."

Whether that decision can be sustained upon the principles of the common law or not, it must be conceded that for more than thirty years it has stood, unchallenged and unquestioned, as an authoritative exposition of the law of this state. And although it has received no express legislative recognition, it has been so long followed in our criminal courts, and acquiesced in by other departments of the government, that we are inclined to the opinion that it ought not now to be overruled; but, on the other hand, its rule should be applied and sustained, in like cases, upon the principle of *stare decisis.*

Before passing from Hamilton *v.* The State, it should be added that the same question has been decided in the same way by the courts of several of our sister States. The State *v.* Ellis, 3 Conn. 185; The State *v.* Bartlett, 11 Vt. 650; The State *v.* Underwood, 49 Maine, 181; Watson *v.* The State, 36 Miss. 593; The State *v.* Johnson, 2 Oregon, 115; The State *v.* Bennett, 14 Iowa, 479; Ferrell *v.* Commonwealth, 1 Duvall, 153; Commonwealth *v.* Cullins, 1 Mass. 116. The same point has been decided the same way in several subsequent cases in Massachusetts.

The exact question, however, now before us has not been decided by this court; and we are unanimously of opinion that the rule laid down in Hamilton *v.* The State should not be extended to cases where the property was stolen in a foreign and independent sovereignty.

We are unwilling to sanction the doctrine or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction and a mere fiction, be treated as an offence committed within this state and in violation of the laws thereof. In this case the goods were stolen in Canada. They were there taken from the custody of the owner into the custody of the thief. The change of possession was complete. The goods were afterward carried by the thief from the Dominion of Canada to the State of Ohio. During the transit his possession was continuous and uninterrupted. Now, the theory upon which this conviction is sought to be sustained is that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of the law only. The fact was otherwise. A further theory in support of the conviction is that as soon as the goods arrived within the State of Ohio, the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it.

That the right of possession, as well as the right of property, remained all the time in the owner is true as matter of law. And it is also true, as a matter of fiction, that the possession of the thief, although exclusive as it must have been in order to make him a thief, is regarded as the possession of the owner, for some purposes. Thus, stolen goods, while in the possession of the thief, may be again stolen by another thief; and the latter may be charged with taking and carrying away the goods of the owner. And for the purpose of sustaining such charge, the possession of the first thief will be regarded as the possession of the true owner. This fiction, however, in no way changes the nature of the facts which constitute the crime of larceny.

What we deny is that a mere change of place by the thief, while he continues in the uninterrupted and exclusive possession of the stolen property, constitutes a new "taking" of the property, either as matter of fact or of law.

Larceny, under the statute of this state, is the same as at common law, and may be defined to be the felonious taking and carrying away of the personal property of another. But no offence against this statute is complete until every act which constitutes an essential element in the crime has been committed within the limits of this state. The act of "taking" is an essential element in the crime, and defines the act by which the possession of the property is changed from the owner to the thief. But the act of "taking" is not repeated after the change of possession is once complete, and while the possession of the thief continues to be exclusive and uninterrupted. Hence, a bailee or finder of goods, who obtains complete possession without any fraudulent intent, cannot be convicted of larceny by reason of any subsequent appropriation of them.

We fully recognize the common-law practice, that when property is stolen in one county, and the thief is afterward found in another county with the stolen property in his possession, he may be indicted and convicted in either county, but not in both. This practice obtained notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The reason for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offence. We are entirely satisfied, however, that the right to prosecute the thief in any county wherein he was found in possession of the stolen property, was not asserted by the Crown, because of the fact that a new and distinct larceny of the goods was committed whenever and wherever the thief might pass from one county into another. His exemption from more than one conviction and punishment makes this proposition clear enough. The common law provided that no person should be twice vexed for the same cause. It was through the operation of this principle that the thief who stole property in one county, and was afterward found with the fruits of his crime in another, could not be tried and convicted in each county. He was guilty of one offence only, and that offence was complete in the county where the property was first " taken " by the thief, and removed from the place in which the owner had it in possession.

When goods piratically seized upon the high seas were afterward carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, " because the original act — namely, the taking of them — was not any offence whereof the common law taketh knowledge; and by consequence, the bringing them into a county could not make the same a felony punishable by our law." 13 Coke, 53; 3 Inst. 113; 1 Hawk. c. 19, sec. 52.

The prisoner was charged with larceny at Dorsetshire, where he had possession of the stolen goods. The goods had been stolen by him in the island of Jersey, and afterward he brought them to Dorsetshire. The prisoner was convicted. All the judges (except Raymond, C. B., and Taunton, J., who did not sit) agreed that the conviction was wrong. Rex *v.* Prowes, 1 Moody C. C. 349.

Property was stolen by the prisoner in France, and was transported to London, where it was found in his possession. Parke, B., directed the jury to acquit the prisoner on the ground of the want of jurisdiction, which was done. Regina *v.* Madge, 9 Car. & P. 29.

A similar decision was made in a case where the property was stolen in Scotland and afterward carried by the thief into England. 2 East P. C. 772, c. 16, sec. 156.

This rule of the common law was afterward superseded, in respect to the United Kingdom, by the statutes of 13 Geo. III., c. 21, sec. 4, and 7 and 8 Geo. IV., c. 29, sec. 76, whereby prosecutions were authorized in any county in which the thief was found, in possession of property stolen by him in any part of the United Kingdom.

In Commonwealth *v.* Uprichard, 3 Gray, 434, the property had been stolen in the province of Nova Scotia, and thence carried by the thief into Massachusetts. The defendant was convicted of larceny charged to have been committed in the latter state. This conviction was set aside by a unanimous court, although two decisions had been made by the same court affirming convictions where the property had been stolen in a sister state, and afterward brought by the thief into that commonwealth. Without overruling the older cases, Chief-Justice

Shaw, in delivering the opinion of the court, distinguished between the two classes of cases.

The following cases are in point, that a state, into which stolen goods are carried by a thief from a sister state, has no jurisdiction to convict for the larceny of the goods, and *a fortiori* when the goods were stolen in a foreign country: In New York: People *v.* Gardner, 2 Johns. 477; People *v.* Schenk, 2 Johns. 479. The rule was afterward changed in that state by statute. New Jersey: The State *v.* Le Blanch, 2 Vroom, 82. Pennsylvania: Simmons *v.* Commonwealth, 5 Binn. 617. North Carolina: The State *v.* Brown, 1 Hayw. 100. Tennessee: Simpson *v.* The State, 4 Humph. 456. Indiana: Beall *v.* The State, 15 Ind. 378. Louisiana: The State *v.* Reonnals, 14 L. An. 278.

There are two cases sustaining convictions for larceny in the States, where the property had been stolen in the British Provinces: The State *v.* Bartlett, 11 Vermont, 650, and The State *v.* Underwood, 49 Maine, 181. In Bartlett's case, the principle is doubted, but the practice adopted in cases where the property was stolen in a sister state was followed, and the application of the principle thereby extended. Underwood's case was decided by a majority of the judges.

After reviewing the cases, we think the weight of authority is against the conviction and judgment below. And in the light of principle, we have no hesitancy in holding that the court below had no jurisdiction over the offence committed by the prisoner.

The judgment below is wrong, unless every act of the defendant which was necessary to complete the offence was committed within the State of Ohio and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal of the goods alleged in this case to have been stolen, was at a place beyond the limits of the state, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original "taking" and the original asportation of the goods by the prisoner must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant before they were brought into this state was a lawful possession, there would be no pretence that the conviction was proper. The same, if his possession was merely tortious. The theory of the law upon which the propriety of the conviction is claimed is based on the assumption that the property was *stolen* in Canada by the prisoner.

By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this state? Certainly not. The criminal laws of this state have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this state.

Shall the question whether or not the "taking" of the property by the prisoner was a crime in Canada be determined by the laws of that country? If this be granted, then an act which was an essential element in the combination of facts of which Stanley was found guilty was in violation of the laws of Canada, but not of this state; and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this state, were essential elements in his offence; therefore, no complete offence was committed in this state against the laws thereof.

I have no doubt the legislature might make it a crime for a thief to bring into this state property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offence. But that offence would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the common law, without reference to any other law or the laws of any other country.

It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this state has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in violation of the rights of the owner: but our criminal courts have no jurisdiction over offences committed against the sovereignty of foreign and independent states.[1]

Judgment reversed and cause remanded.

DAY, C. J., WELCH, STONE, and WHITE, JJ., concurring.

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[1] In addition to the cases cited in this opinion see the following: That conviction may not be had when the property was first taken outside the jurisdiction, Lee *v.* State, 64 Ga. 203; People *v.* Loughridge, 1 Neb. 11. That conviction may be had, Stinson *v.* People, 43 Ill. 397; Worthington *v.* State, 58 Md. 403; State *v.* Newman, 9 Nev. 48; State *v.* Hill, 19 S. C. 435. See also State *v.* Somerville, 21 Me. 14. — ED.

SECTION III.

Taking after Delivery.

(*a*) LARCENY BY BAILEE.

1 Hawkins Pleas of the Crown (7th ed., 1795), 209. In general, where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside unparted with in the first proprietor. Therefore . . . if a watch-maker steal a watch delivered to him to clean (O. B. 1779, No. 83); or if one steal clothes delivered for the purpose of being washed (O. B. 1758, No. 18); or goods in a chest delivered with the key for safe custody (O. B. 1779, No. 83); or guineas delivered for the purpose of being changed into half-guineas (Ann Atkinson's Case, Leach Crown Cas. 247, *notes*); or a watch delivered for the purpose of being pawned (Leach Crown Cas. 320); in all these instances, the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony.[1]

REX *v.* RAVEN.

NEWGATE SESSIONS. 1662.

[*Reported Kelyng*, 24.]

MARY RAVEN, alias Aston, was indicted for stealing two blankets, three pair of sheets, three pillowbiers, and other goods of William Cannon. And upon the evidence it appeared that she had hired lodgings and furniture with them for three months, and during that time conveyed away the goods which she had hired with her lodgings, and she herself ran away at the same time. And it was agreed by my Lord Bridgeman, myself, and my brother Wylde, Recorder of London, then present, that this was no felony, because she had a special property in them by her contract, and so there could be no trespass; and there can be no felony where there is no trespass, as it was resolved in the case of Holmes, who set fire on his own house in London, which was quenched before it went further.

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[1] These cases were first cited in the 6th edition of the treatise (1787) in the notes and were brought up into the text in the 7th edition. The citations of the cases are all (with perhaps one exception) wrong, and it is difficult to identify them. The first case appears to be Rex *v.* Vansas, O. B. 1779, No. 88. The prisoner was journeyman to a watchmaker, and was given the watch by him to repair, and pawned it; in his defence he said, "The watch was given into my care; I appeal to your Lordship and the jury whether this is stealing." He was convicted. The second case cannot be identified. The third case is really Rex *v.* More, O. B. 1758, No. 18. A woman who had been sent to prison gave the key of her chest to the defendant, who stole goods from it; the chest was apparently left in the prosecutor's house. Atkinson's Case was a case of larceny by a servant. The last case cannot be found in Leach, but is Rex *v.* Bradley, O. B. 1784, No. 613. It is a case of larceny by trick. — ED.

[illegible] – breach of trust [illegible]

LEIGH'S CASE.

CROWN CASE RESERVED. 1800.

[*Reported* 2 *East P. C.* 694.]

ELIZABETH LEIGH was indicted at Wells assizes, in the summer of 1800, for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment, was on fire; and that his neighbors had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with having stolen when the prosecutor's other neighbors were thus employed. And it appeared that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor's applying to her next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house, most of the articles artfully concealed in various ways. The jury found her guilty; but it was suggested that she originally took the articles with an honest purpose, as her neighbors had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor; and that therefore the case did not amount to felony. The jury were instructed that whether she took them originally with an honest intent was a question of fact for their consideration; that it did not necessarily follow from the circumstances mentioned that she took them with an honest intent. But even if they were of that opinion, yet that her afterwards hiding the goods in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury found her guilty; but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon reference to the judges, in Michaelmas Term, 1800, all (absent, Lawrence, J.) held the conviction wrong; for if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust.[1]

REX *v.* BANKS.

CROWN CASE RESERVED. 1821.

[*Reported Russell & Ryan*, 441.]

THE prisoner was tried and convicted before Mr. Justice Bayley, at the Lancaster Lent Assizes, in the year 1812, for horse-stealing.

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[1] *Acc.* Reg. *v.* Reeves, 5 Jur. N. S. 716. — ED.

It appeared that the prisoner borrowed a horse, under pretence of carrying a child to a neighboring surgeon. Whether he carried the child thither did not appear; but the day following, after the purpose for which he borrowed the horse was over, he took the horse in a different direction and sold it.

The prisoner did not offer the horse for sale, but was applied to to sell it, so that it was possible he might have had no felonious intention till that application was made.

The jury thought the prisoner had no felonious intention when he took the horse; but as it was borrowed for a special purpose, and that purpose was over when the prisoner took the horse to the place where he sold it, the learned judge thought it right upon the authority of 2 East P. C. 690, 694, and 2 Russ. 1089, 1090,[1] to submit to the consideration of the judges whether the subsequent disposing of the horse, when the purpose for which it was borrowed was no longer in view, did not in law include in it a felonious taking.

In Easter Term, 1821, the judges met and considered this case. They were of opinion that the doctrine laid down on this subject in 2 East P. C. 690 & 694, and 2 Russell 1089 & 1090, was not correct. They held that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking, or make him guilty of felony; consequently the conviction could not be supported.

REGINA v. THRISTLE.

CROWN CASE RESERVED. 1849.

[*Reported* 3 *Cox C. C.* 573.]

THE two following cases were reserved by the Worcestershire Court of Quarter Sessions: —

FIRST CASE.

The prisoner, William Thristle, was indicted at the Worcester Quarter Sessions, 15th October, 1849, for stealing one watch, the property of Robert Warren.

It appeared in evidence that the prosecutor, in 1848, met the prisoner, who was a watchmaker at Malvern. The prosecutor asked prisoner if he was going as far as prosecutor's house; the prisoner said

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[1] In 2 Russ. 1089, it is said that, "In the case of a delivery of a horse upon hire or loan, if such delivery were obtained *bonâ fide*, no subsequent wrongful conversion pending the contract will amount to felony; and so of other goods. But when the purpose of the hiring or loan for which the delivery was made has been ended, felony may be committed by a conversion of the goods." — REP.

Pri[illegible] [illegible]
[illegible]
Held: not larceny – [illegible]

"yes," if the prosecutor had anything for him. The prosecutor said his watch wanted regulating, if prisoner would call.

The prisoner went to the prosecutor's house, and after examining the watch, told the prosecutor's wife that he could do nothing with it there, but must take it to his own house. The prisoner then took it and on his way home met the prosecutor, to whom he mentioned that he was taking the watch to his own house and would return it in two or three days. Prosecutor made no objection.

In a few weeks after, prisoner left the neighborhood without returning prosecutor's watch, and it was not afterwards heard of. The prisoner, on being taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury returned a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking when the prisoner first took the watch from the prosecutor's house, with the knowledge and in the presence of the prosecutor's wife, and entertaining doubt whether the prisoner's subsequent appropriation of the watch could under the circumstances above detailed, constitute larceny, requests the opinion of this court as to the correctness of the conviction in point of law.

SECOND CASE.

The same prisoner was also indicted at the same Sessions for stealing one watch, the property of the prosecutor, Thomas Reynolds. It appeared in evidence that the prisoner, who was a watchmaker at Malvern, received from the prosecutor some time in January, 1848, his silver watch to repair. The prisoner returned it to the prosecutor. A few days after the prisoner had so returned it the prosecutor told the prisoner that the watch gained. The prisoner said that if the prosecutor would let him have it again, he would regulate it and return it in a day or two. The prosecutor thereupon gave the watch to the prisoner, who in eight or nine days left Malvern with the prosecutor's watch in his possession, and was not again heard of until he was arrested on the present charge some time afterwards.

The prosecutor was unable to say whether he had paid for the repairs of his watch or not, but stated that the prisoner, when he left Malvern, had other repairs of the prosecutor's on hand and unfinished.

The prisoner, when taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury found a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking on the part of the prisoner when he received the watch from the prosecutor to regulate it, and entertaining a doubt whether the subsequent departure of the prisoner from Malvern with the prosecutor's watch in his possession could under the circumstances above detailed, constitute larceny, requests the opinion of this court, as in the former case.[1]

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[1] The statement of authorities in point is omitted.

These cases were not argued by counsel but were considered by the following judges: Pollock, C. B., Patteson, J., Wightman, J., Platt, B., and Talfourd, J.

Pollock, C. B., delivered the judgment of the court. The indictment was for stealing a watch, and the circumstances set out in the case do not, on the question of fact, justify the verdict of guilty; but in giving our judgment that the conviction is wrong, we do not proceed merely upon the facts stated. The question put to us in the conclusion of the case seems to be this: The chairman doubted whether a subsequent appropriation could make the entire transaction a larceny, there not having been at the time of the taking any *animus furandi;* and I think we are bound to take it that he directed the jury that the subsequent appropriation might render the transaction larceny, though there was not any intention to steal at the time of the taking; and indeed, the chairman's opinion seems to have been that there was not the *animus furandi* at the time of the taking; and the question is, whether he was right in his direction. We think not, for unless there was a taking *animo furandi,* no dishonest appropriation afterwards could make it larceny. *Conviction reversed.*[1]

REGINA *v.* PRATT.

CROWN CASE RESERVED. 1854.

[*Reported* 6 *Cox C. C.* 373.]

The prisoner was tried at the last January Sessions for the borough of Birmingham, upon a charge of having feloniously stolen, taken, and carried away on the 18th May, in the 16th year of our Sovereign Lady the Queen, one die lathe, the goods of Edward Barker and another; and on the 19th May, in the same year, ten lathes, the property of the said Edward Barker and another, the goods and chattels of the prosecutors; and was found guilty.

The prisoner was a thimble-maker and manufacturer, carrying on his business in two mills, one a thimble-mill and the other a rolling-mill, in the borough of Birmingham; and before the occurrence hereinafter mentioned he was the owner and proprietor of the property mentioned in the indictment.

On the 14th of May, 1853, the prisoner, being in pecuniary difficulties, arranged with the prosecutors, Edward Barker and William Wayte, creditors of the prisoner, and with Mr. Collis, an attorney-at-law who acted on their behalf, to execute an assignment to trustees for the benefit of his creditors; and on the 18th of May a deed of assignment was executed by him, whereby the prisoner assigned to the prosecutors, as trustees for the purposes therein mentioned, certain property by the description following: "all and every the engines, lathes, boilers, furnaces, horses, carts, machinery, tools, and implements of trade, the stock-in-trade, goods, wares, merchandise, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever, save and except leasehold estates of the said David Pratt, in possession, reversion, remainder, or expectancy, together with full and free possession, right and title of entry in and to all and every of the mills, works, messuages, or tenements and premises wherein the said several effects and premises then were: to have and to hold the said engines, and other the premises, unto the said William Barker and William Wayte, their executors, administrators, and assigns, absolutely."

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[1] *Acc.* Reg. *v.* Reynolds, 2 Cox C. C. 170; Reg. *v.* Hey, 3 Cox C. C. 583 (overruling Reg. *v.* McNamee, 1 Moo. C. C. 368, and Reg. *v.* Jackson, 2 Moo. C. C. 32); State *v.* England, 8 Jones, 399; Hill *v.* State, 57 Wis. 377. See Murphy *v.* People, 104 Ill 528, and cases cited (statutory). — Ed.

The deed was executed by the prisoner in the presence of, and was attested by James Rous, who was a clerk of Mr. Collis, and who was not an attorney or solicitor.

On the 29th of May the said deed was again executed by the prisoner in the presence of the said Mr. Collis and in all respects in conformity with the provisions of the 68th section of the Bankrupt Law Consolidation Act, 1849, with the view of preventing the deed from operating as an act of bankruptcy. The deed had been duly stamped on its first execution, but no second stamp was affixed on its second execution, which omission was made the ground of objection to its receipt in evidence. I admitted it, however, subject to the opinion of this honorable court, which I directed should be taken if it became necessary. At the time of the first interview with Mr. Collis on the 14th May, the prisoner said he had stopped work altogether, but on the 16th it was arranged between him and Mr. Collis that the rolling business should be allowed to go on to complete some unfinished work. Mr. Collis then told him to keep an account of the wages of the men employed on the rolling work and to bring it to the trustees. This the prisoner did, on the 19th May, when the wages were paid by the trustees and the rolling business finally stopped.

In the nights of Monday, the 16th May, and of every other day during that week, the prisoner removed property conveyed by the deed — including the articles mentioned in the indictment — from the thimble and rolling mills (some of the heavier machines being taken to pieces for the purpose of removal), and hid them in the cellar and other parts of the house of one of his workmen. Some time afterwards, and after the sale by the trustees of the remainder of the property, a Mr. Walker, who had been a large purchaser at the sale, recommenced the business at the thimble and rolling mills, and the prisoner acted as his manager, when the property which formed the subject of the indictment was by the prisoner's directions brought back at intervals to the mills.

No manual possession of the property was taken by the prosecutors prior to its removal from and back to the mills, but the prisoner remained in possession after the execution of the deed, in the same manner as before.

I asked the jury three questions : 1st. Did the prisoner remove the property after the execution of the deed of assignment? 2dly. Did he so act with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods? 3dly. Was he at the time of such removal in the care of and custody of such goods as the agent of the trustees under the deed?

I put these three questions to the jury separately, and they separately answered them as follows : 1st. He did remove the property after the execution of the assignment. 2dly. He did so remove it with fraudulent intent. And, lastly, he was not in the care and custody of the goods as the agent of the trustees. And thereupon (being of opinion that the two affirmative answers would support a conviction, notwithstanding the third answer in the negative), I directed the jury to find the prisoner guilty, which they did.

The questions for the opinion of the court are : 1st. Whether the deed of assignment ought to have been received in evidence. 2d. Whether my direction to the jury was correct. And, lastly, whether the conviction is valid.

Bittleston (*Field* with him), for the prisoner. The conviction is wrong. 1st. The prisoner was in lawful possession of the goods, and a taking by him did not constitute larceny. *Furtum non est ubi initium habet detentionis per dominum rei.* The trustees had not even a constructive possession for this purpose, though they probably had for the purpose of maintaining a civil action of trespass against a third person. The doctrine of constructive possession underwent consideration in R. *v.* Reed, 23 L. J. 25, M. C., where a servant was sent to fetch coals ; and it was held that the servant's possession was only determined when he had placed the coals in his master's cart, which was the same thing for that purpose as the master's warehouse. If this case is put upon the ground that the prisoner was a bailee and broke bulk the jury have negatived a bailment. 2d. Under the 68th section of the Bankrupt Act, the re-execution constituted a material alteration of the deed, which therefore required to be restamped. [LORD CAMPBELL, C. J. — Was not the re-execution a mere nullity?] Probably that is so.

A. Wills, contra. This is a case of bailment. The trustees permitted the prisoner to continue in possession, and by so doing constituted him a bailee. [LORD CAMPBELL, C. J. — The jury have found the contrary.] They have only found that he was not their agent; and there is a distinction between an agent and a bailee.

LORD CAMPBELL, C. J. It is found that he had not the care or custody of the goods as their agent; and that clearly negatives a bailment; and that is the only ground upon which this case could be put. The prisoner, therefore, was in lawful possession of the goods and cannot be convicted of larceny.

Alderson, B. This is a case of a man stealing goods out of his own possession. *Conviction quashed.*

SECTION III. (*continued*).

(*b*) Larceny by Breaking Bulk, &c.

CARRIER'S CASE.

Star Chamber and Exchequer Chamber. 1473.

[*Reported Year Book*, 13 *Ed. IV.*, 9, *pl.* 5].[1]

In the Star Chamber before the King's Council such matter was shown and debated: where one has bargained with another to carry certain bales with, etc., and other things to Southampton, he took them and carried them to another place and broke up (*debrusa*) the bales and took the goods contained therein feloniously, and converted them to his proper use, and disposed of them suspiciously; if that may be called felony or not, that was the case.

Brian, C. J. I think not, for where he has the possession from the party by a bailing and delivery lawfully, it cannot after be called felony nor trespass, for no felony can be but with violence and *vi et armis*, and what he himself has he cannot take with *vi et armis* nor against the peace; therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detinue.

Hussey, the King's Attorney. Felony is to claim feloniously the property without cause to the intent to defraud him in whom the property is. *animo furandi*, and here notwithstanding the bailment *ut supra* the property remained in him who bailed them, then this property can be feloniously claimed by him to whom they were bailed as well as by a stranger; therefore it may be felony well enough.

The Chancellor [Booth]. Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession

Molineux, ad idem. A matter lawfully done may be called felony or trespass, according to the intent; *sc.* if he who did the act do not pursue the cause for which he took the goods, as if a man distrain for damage feasant or rent in arrear, and then he sell the goods and kill the beasts, this is tort now where at the beginning it was good. So if a man come into a tavern to drink it is lawful; but if he carry away the piece or do other trespass, then all is bad. So although the taking was lawful in the carrier *ut supra*, etc., yet when he took the goods to another place *ut supra* he did not pursue his cause, and so by his act after it may be called felony or trespass, according to the intent.

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[1] Translation of Pollock and Wright, Possession, p. 134.

BRIAN, C. J. Where a man does an act out of his own head, it may be a lawful act in one case and in another not, according to his act afterwards, — as in the cases which you have put, — for there his intent shall be judged according to his act; but where I have goods by your bailment, this taking cannot be made bad after by anything.

Varisour. Sir, our case is better than a bailment, for here the things were not delivered to him, but a bargain that he should carry the goods to Southampton *ut supra*, and then if he took them to carry them thither he took them warrantably; and the case put now upon the matter shows, that is, his demeanor after shows, that he took them as felon and to another intent than to carry them, *ut supra*, in which case he took them without warrant or cause, for that he did not pursue the cause, and so it is felony.

CHOKE, J. I think that where a man has goods in his possession by reason of a bailment, he cannot take them feloniously, being in possession; but still it seems here that it is felony, for here the things which were within the bales were not bailed to him, — only the bales as an entire thing were bailed *ut supra* to carry, — in which case if he had given the bales or sold them, etc., it is not felony; but when he broke them, and took out of them what was within, he did that without warrant, — as if one bailed a tun of wine to carry; if the bailee sell the tun it is not felony nor trespass; but if he took some out it is felony; and here the twenty pounds were not bailed to him, and peradventure he knew not of them at the time of the bailment. So is it if I bail the key of my chamber to one to guard my chamber, and he take my goods within this chamber, it is felony; for they were not bailed to him.

It was then moved that the case ought to be determined at common law.[1] The matter was afterwards argued before the judges in the Exchequer Chamber.

And there it was holden by all but NEDHAM, J., that where goods are bailed to a man he cannot take them feloniously; but Nedham held the contrary, for he might take them feloniously as well as another; and he said it had been held that a man can take his own goods feloniously, as if I bail goods to a man to keep and I come privily — intending to recover damages against him in detinue — and I take the goods privily, it is felony. And it was holden that where a man has possession and that determines, he can then be felon of the things, as if I bail goods to one to carry to my house and he bring them to my house and then take them thereout, it is felony, for his possession is determined when they were in my house; but if a taverner serve a man with a piece, and he take it away, it is felony, for he had not possession of this piece, for it was put on the table but to serve him to drink

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[1] So much of the case as relates to this motion is omitted.

And so is it of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony; for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants so that they are in possession of it.

LAICON, J. I think there is a diversity between bailment of goods and a bargain to take and carry, for by the bailment he has delivery of possession; but by the bargain he has no possession till he take them, and this taking is lawful if he takes them to carry, but if he take them to another intent than to carry them, so that he do not pursue his cause, I think that shall be called felony well enough.

BRIAN, C. J. I think that it is all one, a bargain to carry them and a bailment, for in both cases he has authority of the same person in whom the property was, so that it cannot be called felony, M. 2 E. III., in an indictment "*felonice abduxit unum equum*" is bad, but it should be *cepit;* so in eyre at Nott., 8 E. III.; and in this case the taking cannot be feloniously, for that he had the lawful possession; so then the breaking the bales is not felony, *vide* 4 E. II. in trespass, for that plaintiff had bought a tun of wine of defendant, and while it was in defendant's guard defendant came with force and arms and broke the tun and carried away parcel of the wine and filled up the tun with water.

And for that it appeared he had possession before, the writ, being *vi et armis*, was challenged; and yet it was held well, and he pleaded not guilty, and then the justices reported to the Chancellor in Council that the opinion of the most of them was that it was felony.[1]

TUNNARD'S CASE.

OLD BAILEY. 1729.

[*Reported Leach* (4*th ed.*) 214, *n.*]

JOHN TUNNARD was tried before Lord Chief Justice Raymond, present Mr. Baron Hale and Mr. Justice Denton, for stealing a brown mare, the property of Henry Smith. It appeared in evidence the prosecutor lived in the Isle of Ely; that he lent the prisoner the mare to ride to a place three miles distant; but that instead of riding three miles according to agreement the prisoner rode her up to London, and sold her. Lord Chief Justice Raymond left it with the jury *quo animo* he had ridden the mare to London, and they found him guilty.

THE COURT. The finding of the jury will make this case felony because he rode the mare farther than he had agreed to do; for if there had been no special agreement the privity would have remained, and it could not have been felony.

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[1] *Acc.* State *v.* Fairclough, 29 Conn. 47; Robinson *v.* State, 1 Coldw. 120. See Kelyng, 82; 2 East P. C. 695: Chaplin Crim. Cas. 298; 6 Harv. L. Rev. 250. — ED.

REX *v.* MADOX.

Crown Case Reserved. 1805.

[*Reported Russell & Ryan*, 301.]

This was an indictment for a capital offence on the 24 G. II. c. 45, tried before Mr. Baron Graham at the summer Assizes at Winchester, in the year 1805.

The first count was for stealing at West Cowes six wooden casks and one thousand pounds' weight of butter, value £20, the goods of Richard Bradley and Thomas Clayton, being in a certain vessel called a sloop in the port of Cowes, the said port being a port of entry and discharge, against the statute. The second count was for grand larceny. The third count was like the first except as to the property in the goods, which was laid in one Richard Lashmore; and the fourth count was for grand larceny of the goods of the said Richard Lashmore.

The butter stolen was part of a cargo of 280 firkins or casks, shipped at Waterford, in Ireland, on board a sloop, the "Benjamin," of which the prisoner was master and owner, bound to Shoreham and Newhaven in Sussex, — two hundred and thirty of the casks being consigned to Bradley and Clayton at Shoreham, and fifty of them to Lashmore at Brighthelmstone.

It appeared that the ordinary length of this voyage, with fair winds, was a week or nine days, but in winter sometimes a month or five weeks. In the present instance the voyage had been of much longer duration.

The vessel first touched at Sheepshead, in Ireland, in distress. The prisoner went on shore at Beerhaven, where he signed a protest, bearing date on the 20th December, 1804. From thence they proceeded to Lundy Island and to Tenby in Wales, where they arrived in February, 1805, and at which place the prisoner went on shore and stayed four or five weeks, the winds being foul. From thence they proceeded to Scilly and then to Cowes, where they arrived on the last day of March or the 1st of April, 1805. Cowes was in their course, but they had previously met with very foul weather and had been driven to the westward of Madeira, during which time the vessel had been often in great distress; but no part of the butter had at any time been thrown overboard. Upon the arrival at Cowes the prisoner went on shore and shortly afterwards applied to one Lallow, a sailmaker, for a suit of sails. Lallow went aboard the vessel and took measure for the sails; and after his return to Cowes the prisoner called upon him again and bespoke a hammock, and then stated that he had thirteen casks of butter on board the vessel, belonging to himself, and requested Lallow to send for them and deposit them in his sail-loft until the prisoner returned from Newhaven. At the same time he gave Lallow a note or order for the mate of the vessel, by which the mate was required to deliver thirteen casks of butter to the bearer. Lallow dispatched some of his men with the order and a boat to the vessel, where they arrived in the night, and after having delivered the order to the mate, received from him seven casks of butter in the first instance, being as much as the boat would carry; and upon their return to the vessel, during the night, received from the mate the other six casks. The order did not require the mate to deliver any particular casks; and it appeared by the evidence of the mate that he took them as they came to hand. The casks had been originally stowed in the hold and upon the half-decks as they came on board, and those delivered to Lallow's men were taken from the half-decks, the others being battened down. The seven casks first delivered by the mate were taken to Lallow's premises and deposited there; the other six casks were seized by the custom-house officers. The prisoner was at Cowes and was informed by Lallow of the seizure, at which he expressed anger, speaking of the seizure as a robbery and of the casks so seized as his own property and venture. He also spoke of going to claim his property, and afterwards told Lallow that he would give him an order to claim it, as he must himself go away. The prisoner afterwards went to the vessel and passed the rest of the night on board. The remainder of the cargo was delivered at Shoreham and Newhaven.

The protest made by the prisoner, and bearing date at Beerhaven, the 20th of December, 1804, purported, among other things, that the prisoner had been obliged to throw overboard several casks of butter; and it appeared that he had held the same language to the consignees as his excuse for delivering short of their respective consignments.

Upon this case the counsel for the prisoner raised two objections: first, that no larceny had been committed by the prisoner; and secondly, that the offence was not capital, — the larceny, if any, being of goods in his own vessel.

Upon the first objection it seemed to be admitted that if the mate, by the order of the prisoner, had broken bulk by taking the casks from those which were battened down, it might have been larceny in the prisoner; and the learned judge thought, that as the casks were taken from the half-deck, where they were originally stowed, there was no material difference. It was then contended that the prisoner went into Cowes without any necessity, and out of the course of his voyage; and the case was compared to those wherein it had been held, that if goods are delivered to a carrier to carry to a certain place, and he carries them elsewhere and embezzles them, it is no felony. 1 Hale, 504, 505; 2 East P. C. 693, 695, 696. But the learned judge thought that the severance of a part from the rest, and the formed design of doing so, took the case out of those authorities, if they could be considered as applying to the present case.

Upon the second objection, those cases were cited wherein it had been held that the 12 Anne St. 1, c. 7, against larceny in a dwelling-house, to the value of forty shillings, does not extend to a stealing by a man in his own house (2 East P. C. 644); but the learned judge thought, that though this might be the law as to a person stealing the goods of another under the protection of his own house, yet the case of a man stealing the goods of another laden on board his own vessel was different, as in such case the vessel for the voyage might be considered as the vessel of the freighter; and that if the owner should take the command of the vessel, the stealing the goods committed to his care would be an aggravation of his offence. And he further observed that the words and occasion of the two statutes would admit of a distinction.

The whole case was therefore left to the jury, who found the prisoner guilty; but the sentence was respited, in order that the opinion of the judges might be taken.

In Michaelmas term, 1805, the case was considered by the judges, who were of opinion that it was not larceny; and that if it were larceny, it would not have amounted to a capital offence within the statute 24 G. II. c. 45.

REGINA v. POYSER.

CROWN CASE RESERVED. 1851.

[*Reported* 2 *Denison C. C.* 233.]

THE prisoner was tried before Mr. Baron Alderson, for larceny, at the spring Assizes, A. D. 1851, for the county of Leicester. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms: The prosecutor fixed the price of each article, and the prisoner was entrusted to sell them at that fixed price, and when he had done so he was to bring back the money and the remainder of the clothes unsold, and was to have three shillings in the pound on the moneys received for his trouble. On the 12th of February last he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, the learned baron directed the jury, that the

of guilty | of larceny |

original bailment of the goods by the prosecutor to the prisoner was determined by his unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would in point of law amount to larceny. Upon this direction the prisoner was found guilty, and the question for this court was, whether this direction was right.

On the 26th of April this case was argued by *O'Brien*, for the prisoner.

The contract with the prisoner was distinct and separate with regard to each article entrusted to him. The fact of his receiving all the articles at one time was a mere accident, which makes no legal difference in the case; each article had a separate price affixed to it. After he had pawned some of the articles, when was the original bailment of the others determined?

LORD CAMPBELL. The case states, that on the 12th of February, he took away *a parcel of clothes;* we must, therefore, regard the delivery of that parcel as one bailment of all the articles contained in the parcel.

O'Brien. The prisoner had authority to break the bulk; the contract imposed on him the necessity of opening it in order to take out each article and deal with it separately.

COLERIDGE, J. Why may not there be a single contract embracing several particulars, as for instance, where a carrier is entrusted with various articles to leave at different places, all of which articles are placed in one bag; if he wrongfully deals with any one, is it not a breaking bulk of the whole?

O'Brien. The doctrine of breaking bulk turns on there being no authority to open the parcel and deal with any one of the articles separately from the rest.

ALDERSON, B. If you can make out this to be like the case of a carrier entrusted with several parcels under several distinct contracts, then certainly it is no larceny.

LORD CAMPBELL, C. J. I think the conviction was right. The case must be considered as though it was a single bailment. If there had been several bailments, then the wrongful dealing with one of the articles so bailed would not affect the case as to any other article. But it makes no difference that in one parcel there were several articles. The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrongful dealing with one or more of several articles, all of which, when entrusted, had been contained in one bulk.

ALDERSON, B., and PLATT, B., concurred.

COLERIDGE, J. The fact of different prices being affixed to each article makes no difference in the case.

COMMONWEALTH v. JAMES.

Supreme Judicial Court of Massachusetts. 1823.

[*Reported* 1 *Pickering*, 375.]

An indictment was found in this case as follows:[1] "The jurors, etc., present, that Noah James, of, etc., miller, on, etc., at Boston aforesaid, with force and arms, three tons weight of barilla of the value, etc., of the goods and chattels of one Thomas Park, in his possession then and there being, did then and there feloniously steal," etc.

The prisoner was convicted and sentenced at the Municipal Court and he appealed to this court.

At the trial in November term, 1822, before Parker, C. J., it was in evidence that, Park having a quantity of barilla which he wished to have ground, sent it to a mill kept by the prisoner for grinding plaster of Paris, barilla, and other articles; that after it was ground, a mixture consisting of three-fourth parts of barilla and one-fourth part of plaster of Paris was returned by the same truckman who carried the barilla to the mill, he being on both occasions in the employment of Park.

The prisoner's counsel contended, that it appearing that the barilla was sent to and brought from the mill by a truckman, who for aught appearing in the case was alive and within the reach of the process of the court at the time of trial, without his testimony there was no legal proof that the barilla was ever delivered to the prisoner or the mixture received from him. But there being evidence that the barilla was ground at the prisoner's mill, by his order, he being sometimes present, and a bill of the expense of grinding having been made out and presented by him, and the money received by him, there being also evidence tending strongly to show that he had practised a fraud upon the barilla, the objection was overruled; and whether the mixture was accidental or fraudulent, and whether it was caused by the prisoner or not, were questions left to the jury to decide, upon a great deal of circumstantial evidence, no person having seen him do it, and the laborer who had the immediate charge of the grinding having sworn that no mixture was made except what was accidental.

It was likewise contended, that supposing the facts to be as the evidence on the part of the government tended to prove them, the case made out was not larceny but only a breach of trust, or at most a fraud, with which the prisoner was not charged in the indictment. On this point the jury were instructed that if they were satisfied from the evidence that the prisoner had taken from the parcel of barilla any quantity with a view to convert it to his own use, introducing into the mass an article of inferior value for the purpose of concealing the fraud, he was guilty of larceny.

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[1] The caption of the indictment is omitted.

The jury having found a verdict against the prisoner, he moved for a new trial on account of these directions of the judge.[1]

PUTNAM, J., delivered the opinion of the court.

To constitute the crime of larceny, there must be a felonious taking and carrying away of the goods of another. It is supposed to be *vi et armis*, *invito domino*. But actual violence is not necessary; fraud may supply the place of force.

The jury have found that the defendant took the goods with an intent to steal them; and the verdict is well warranted, if at the time the defendant took them, they were not lawfully in his possession with the consent of the owner, according to a subsisting special contract, in consequence of an original delivery obtained without fraud. If that was the case, the inference which the counsel for the defendant draw would follow, that such a taking would not be felony but a mere breach of trust, for which a civil action would lie, but concerning which the public have no right to inquire by indictment.

The counsel for the defendant have referred us to 13 Ed. IV., fol. 9, as the authority upon this point. The case was as follows.[2]

I have been thus minute in examining this case, as it is referred to as the foundation upon which many subsequent decisions rest. It will be perceived that here may be found the distinctions which are recognized in the text books upon this subject. Thus, if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery were merely colorable, a taking under such circumstances would be felony. So if the goods were delivered originally upon a special contract, which is determined by the fraudulent act of him to whom they were delivered, or by the completion of the contract, a taking *animo furandi* afterwards should be adjudged to be felony.

In the application of these general rules to the cases which arise, it is obvious that shades of difference, like the colors of the rainbow, so nearly approach each other as to render it extremely difficult to discriminate them with satisfactory precision. The humane rule of the law is, that in cases of doubt the inclination should be in favor of the defendant. The seeming, perhaps real, contradictions to be met with in the English decisions may have been influenced by the desire to save human life.

The case of Rex *v.* Channel, 2 Str. 793, cited for the defendant, was an indictment against a miller employed to grind wheat, stating that he with force and arms *unlawfully* did take and detain part of it. The indictment was held bad upon demurrer. The reasons assigned in the book are, that there was no actual force laid and that this was a matter of a private nature; but a better reason seems to us to have been that there was no averment that the defendant took the wheat *feloniously.*

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[1] Arguments of counsel and part of the opinion not relating to the question of larceny, have been omitted.

[2] The learned judge here stated the Carrier's case, *supra*.

The case of The King *v.* Haynes, cited for the defendant from 4 M. & S. 214, was an indictment for a fraud against a miller for delivering oatmeal and barley instead of wheat which was sent to be ground. It is not for a felony. The court thought no indictable offence was set forth. The question whether if the miller had taken any of the corn, which was sent to be ground, *with an intent to steal it*, was not then under consideration.

In the case at bar, the goods came lawfully into the hands of the defendant by the delivery of the owner. If he is to be convicted, it must be on the ground that he took the goods as a felon after the special contract was determined.[1]

In Kelyng, 35, a silk throwster had men to work in his own house, and delivered silk to one of them to work, and the workman stole away part of it; and it was held to be felony notwithstanding the delivery. East, in his Crown Law, supposes that if the silk had been delivered to be carried to the house of the workman, and he had there converted a part of it to his own use, it could not have been felony; but that as it was to be worked up in the house of the owner, it might be considered as never in fact out of his possession. But Kelyng seems to put the case upon the ground of the special contract, "that the silk was delivered to him only to work, and so the entire property remained in the owner."

But whatever may be the true ground of decision in that case, there is a case in 1 Roll. Abr. 73, pl. 16, which is recognized as good law by Hawkins, East, and other writers, which is very applicable to the case at bar. "If a man says to a miller who keeps a corn mill, thou hast stolen three pecks of meal, an action lies; for although the corn was delivered to him to grind, nevertheless if he steal it, it is felony, being taken from the rest." Langley *v.* Bradshawe, in Error, 8 Car. B. R. That decision proceeded upon the ground of a determination of the privity of the bailment. Hawkins observes (bk. i. c. 33, § 4) that such possession of a part distinct from the whole was gained by wrong and not delivered by the owner; and also, that it was obtained basely, fraudulently, and clandestinely.

This remark is peculiarly applicable to the case at bar; for there is no evidence that the owner intended to divest himself of his property by the delivering of it to the defendant. The defendant did not pursue the purpose for which it was delivered to him, but separated a part from the rest, for his own use, without pretence of title; and by that act the contract was determined. From thenceforward the legal possession was in the owner, and a taking of the part so fraudulently separated from the rest, *animo furandi,* must be considered as larceny.

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[1] The learned judge here stated the case of Rex *v.* Charlewood, 2 East P. C. 689. — Ed.

SECTION IV.

Taking with Consent.

(*a*) WHAT CONSTITUTES CONSENT.

REX *v.* SHARPLESS.

CROWN CASE RESERVED. 1772.

[*Reported Leach* (*4th ed.*), 92.]

AT the Old Bailey in May Session, 1772, John Sharpless and Samuel Greatrix were convicted before Mr. Justice Gould, present Mr. Baron Adams, of stealing six pair of silk stockings, the property of Owen Hudson; but a doubt arising whether the offence was not rather a fraud than a felony, the judgment was respited, and the question referred to the consideration of the judges upon the following case:

On the 14th March, 1772, Samuel Greatrix, in the character of servant to John Sharpless, left a note at the shop of Mr. Owen Hudson, a hosier in Bridge Street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red Lamp in Queen Square. The hosier took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlor, where Sharpless was sitting in a dressing-gown, his hair just dressed, and rather more powder all over his face than there was any necessity for. Mr. Hudson unfolded his wares, and Sharpless looked out three pair of colored and three pair of white silk stockings, the price of which, Mr. Hudson told him, was 14*s.* a pair. Sharpless then desired Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Hudson hung the six pair of stockings which Sharpless had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Hudson's absence Sharpless and Greatrix decamped with the six pair of stockings, which were proved to have been afterwards pawned by Sharpless and one Dunbar, an accomplice in some other transactions of the same kind, for which the prisoners were indicted.

The judges were of opinion that the conviction was right; for the whole of the prisoners' conduct manifested an original and preconcerted design to obtain a tortious possession of the property. The verdict of the jury imports that in their belief the evil intention preceded the leaving of the goods; but, independent of their verdict, there does not appear a sufficient delivery to change the possession of the property.[1]

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[1] *Acc.* U. S. *v.* Rodgers, 1 Mack. 419. — ED.

REGINA *v.* LOVELL.

CROWN CASE RESERVED. 1881.

[*Reported* 8 *Queen's Bench Division*, 185.]

THE following case was stated for the opinion of this court by the Chairman of the Worcestershire Quarter Sessions: —

The prisoner was tried before me at the last Worcestershire Quarter Sessions on an indictment which charged him in the first count with stealing the sum of 5*s.* 6*d.*, the property of Eliza Grigg, and in the second count with demanding with menaces from the said Eliza Grigg the sum of 5*s.* 6*d.* with intent to steal the same. The facts were these: The prisoner was a travelling grinder. He ground two pairs of scissors for the prosecutrix, for which he charged her fourpence. She then handed him six knives to grind. He ground them and demanded 5*s.* 6*d.* for the work. She refused to pay the amount on the ground that the charge was excessive. The prisoner then assumed a menacing attitude, kneeling on one knee, and threatened prosecutrix, saying, "You had better pay me, or it will be worse for you," and "I will make you pay." The prosecutrix was frightened and in consequence of her fears gave the prisoner the sum demanded. Evidence was given that the trade charge for grinding the six knives would be 1*s.* 3*d.*

It was contended for the prisoner that as some money was due, the question rested simply on a *quantum meruit*, and that there was no larceny or menacing demand with intent to steal.

I overruled the objection and directed the jury on the authority of Regina *v.* M'Grath, Law Rep. 1 C. C. R. 205, that if the money was obtained by frightening the owner, the prisoner was guilty of larceny.

The jury found that the money was obtained from the prosecutrix by menaces and that the prisoner was guilty.

I reserved for the consideration of this court the question whether upon the facts stated he was properly convicted.

PER CURIAM. The conviction in this case was right. Regina *v.* M'Grath is conclusive of the matter.[1]

REGINA *v.* EDWARDS.

CROWN CASE RESERVED. 1877.

[*Reported* 13 *Cox C. C.* 384.]

THE prisoners were tried at the West Kent Quarter Sessions, held at Maidstone, on the 5th of January, 1877, on an indictment charging them with stealing three dead pigs, the property of Sir William Hart Dyke, Bart.

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[1] *Acc.* Reg. *v.* MacGrath, 11 Cox C. C. 347; Reg. *v.* Hazell, 11 Cox C. C. 597; State *v.* Bryant, 74 N. C. 124. See U. S. *v.* Murphy, McA. & M. 375. — ED.

The evidence was to the following effect: The three pigs in question having been bitten by a mad dog, Sir William Hart Dyke, to whom they belonged, directed his steward to shoot them. The steward thereupon shot them each through the head and ordered a man named Paylis to bury them behind the barn. The steward stated that he had no intention of digging them up again or of making any use of them. Paylis buried the pigs, pursuant to directions, behind the barn on land belonging to Sir William Hart Dyke, in a place where a brake-stack is usually placed. The hole in which the pigs were buried was three feet or more deep, and the soil was trodden in over them.

The prisoner Edwards was employed to help Paylis to bury the pigs. Edwards was seen to be covering the pigs with brakes, and in answer to Paylis's question why he did so, said that it would keep the water out, and it was as well to bury them "clean and decent."

The two prisoners went the same evening and dug up the pigs, and took them to the railway station, covered up in sacking, with a statement that they were three sheep, and sent them off for sale to a salesman in the London Meat Market, where they were sold for £9 3*s.* 9*d.*, which was paid to the prisoners for them.

The counsel for the prisoners submitted that there was no evidence in support of the charge to go to the jury, on the following grounds: firstly, that the property was not proved as laid in the indictment, as Sir William Hart Dyke had abandoned his property in the pigs; secondly, that under the circumstances the buried pigs were of no value to the prosecutor; and, thirdly, that under the circumstances the buried pigs were attached to the soil, and could not be the subject of larceny.

The Chairman, however, thought that the case was one for the jury, and directed them, as to the first point, that in his opinion there had been no abandonment, as Sir William's intention was to prevent the pigs being made any use of; but that if the jury were of opinion that he had abandoned the property they should acquit the prisoners. He also told the jury that he thought there was nothing in the other two objections.

The jury found the prisoners guilty.

The question for the consideration of the court is whether, having reference to the objections taken by prisoners' counsel, there was evidence on which the jury were justified is convicting the prisoners of larceny.

If the answer to this question be in the negative, then the conviction to be quashed, otherwise affirmed.

No counsel appeared to argue on either side.

By the COURT: *Conviction affirmed.*

REGINA *v.* HANDS.

CROWN CASE RESERVED. 1887.

[*Reported* 16 *Cox C. C.* 188.]

CASE reserved by the Quarter Sessions for the County of Gloucestei as follows: —

Prisoners Hands and Phelps were severally indicted for that on the 29th day of November, 1886, they did feloniously steal, take, and carry away one cigarette, of the goods and chattels of Edward Shenton, against the peace of our said Lady the Queen.

Prisoner Jenner was indicted for an attempt to steal, etc.

Prisoners Jenner and Phelps pleaded guilty.

Prisoner Henry Hands pleaded not guilty and was given in charge to the jury.

This is a case of larceny from what is known as an "automatic box," and the circumstances are as follows: —

Mr. Edward Shenton is the lessee of the Assembly Rooms at Cheltenham, and has fixed against the wall of the passage leading from the High Street to the rooms an "automatic box."

This box presents the appearance of a cube of about eight or ten inches, and in the upper right-hand corner (facing the operator) of the front face there is a horizontal slit, or opening, of sufficient size to admit a penny piece.

In the centre of the face is a projecting button or knob about the size of a shilling.

In the lower left-hand corner is a horizontal slit, or opening, of sufficient size to allow of the exit of a cigarette.

There is an inscription on the face of the box: "Only pennies, not halfpennies."

Also: "To obtain an Egyptain Beauties cigarette, place a penny in the box and push the knob as far as it will go."

If these directions are followed a cigarette will be ejected from the lower slit on to a bracket placed to receive it.

The box is the property of the Automatic Box Company. The cigarettes with which it was charged belonged to Mr. Shenton.

For some time past Mr. Shenton has found on clearing the box, which he did once or twice a day, that a large number of metal disks (brass and lead) of the size and shape of a penny had been put in, and a corresponding number of cigarettes had been taken out.

In consequence of this discovery a watch was set upon the box, and upon the day named in the indictment, the box having been previously cleared, two gentlemen were seen to go to it; each put something in and each took a cigarette as it appeared.

The box was then examined and found to contain one English penny and one French penny. These coins were left in. The box was locked and the watch was again set.

Shortly after this, three lads (afterwards proved to be the three prisoners) were seen to come to the entrance of the passage. One of them came in, went to the box, put something in, obtained a cigarette, and then rejoined the other two at the entrance. This was repeated a second time. The third time it was observed that the box would not work, and while the lad, who afterwards was found to be the prisoner Jenner, was pushing at the knob the watchman came from his place of concealment and put his hand upon him.

The box was then opened and a piece of lead was discovered stuck in the "valve," which had the effect of preventing the machinery of the box from working.

It was then found that the box contained (besides the English and French pennies already mentioned) two disks of brass about the size and shape of a penny.

No other coin or metal piece was found in the box, and no one (but the three lads as above mentioned) had approached it after the two gentlemen who had put in the English and French pennies.

The prisoner Jenner was given in charge to the police, and the two other prisoners were subsequently apprehended.

Upon being brought together at the police station the prisoners all made statements more or less implicating themselves and each other.

The prisoner Hands said: "Me and Jenner met Phelps about 7.45 P. M. Phelps said: 'I want to go to Dodwell's.' I did not go and we went down into the High Street. Phelps and Jenner stopped by the Assembly Rooms and went in; I remained outside. I believe Jenner was caught at the box. Mr. Shenton's man took him inside. I afterwards put a penny in the box and had a cigarette myself. The pieces of brass produced are cut in our shop, the blacksmith's shop at Mr. Marshall's."

In leaving the case to the jury the learned chairman told them that they would have to consider: First, was there a theft committed; that is, was Mr. Shenton unlawfully deprived of his property without his knowledge or consent? Secondly, if that were so, were they satisfied that the prisoner (Hands) took any part in the robbery? He also told them that if they thought that the prisoner was one of the three lads who came to the entrance of the passage, and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box; or that he afterwards partook of the proceeds of the robbery; or that he had taken a part in making the disks, knowing for what purpose they were to be used, — that they would be justified in finding him guilty although he might not actually have put the disks into the box or have taken out a cigarette.

The jury found the prisoner (Hands) guilty, and upon motion in arrest of judgment on the ground that "the facts as disclosed by the evidence were not sufficient to constitute a larceny," all the prisoners were allowed to stand out on bail until the next Quarter Sessions.

The question for the court was whether the facts as disclosed by the evidence were sufficient to constitute a larceny.

No one appeared on either side.

LORD COLERIDGE, C. J. In this case a person was indicted for committing a larceny from what is known as an "automatic box," which was so constructed that if you put a penny into it and pushed a knob in accordance with the directions on the box a cigarette was ejected on to a bracket and presented to the giver of the penny. Under these circumstances there is no doubt that the prisoners put in the box a piece of metal which was of no value, but which produced the same effect as the placing a penny in the box produced. A cigarette was ejected, which the prisoners appropriated; and in a case of that class it appears to me there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent and the cigarette so made to come out was appropriated. It is perhaps as well to say that the learned chairman somewhat improperly left the question to the jury. He told them that if they thought that the prisoner Hands was one of the three lads who came to the entrance of the passage and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box, or that he afterwards partook of the proceeds of the robbery, they would be justified in finding him guilty, — he did not say larcenously or feloniously; and he further directed them that if they thought the prisoner had taken a part in making the disks, knowing for what purpose they were to be used, they would be justified in finding him guilty although he might not actually have put the disks into the box or have taken out a cigarette. Now I am not quite sure that simply the fact of doing an unlawful thing, as joining in the manufacture of a disk that some one else was to use, would make him guilty of larceny. He might be guilty of something else, but I doubt very much whether he could be convicted of larceny. As upon the facts of the case, however, I do not think that the jury could have been misled, and as upon the facts there was undoubtedly a larceny committed, I am not disposed to set aside the conviction.

POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ., concurred.

Conviction affirmed.

MITCHUM *v.* STATE.

SUPREME COURT OF ALABAMA. 1871.

[*Reported* 45 *Alabama*, 29.]

APPEAL from Circuit Court of Shelby. Tried before Hon. Charles Pelham. The facts material to the point decided will be found in the opinion.

Cobb & Lewis, for appellant. The testimony shows that the matches were placed upon the counter for the use of the public, and the accommodation of the public, that any and every person had the right to take the matches without limit, to light their pipes and cigars. The defendant certainly had the right to take the matches to light his pipe or cigar, and he had the right to use the entire box in this way. The fact that he may have used them for a different purpose would not make the taking felonious. There can be no larceny where the owner consents to the taking. The taking must be without authority and against the will of the owner. If the taking is not felonious, although the property may be converted to an improper use, yet the defendant is not guilty of larceny.

John W. A. Sanford, Attorney General, *contra.*

Saffold, J. The defendant was indicted for petit larceny. On the trial the evidence material to the exception taken by him was that the box of matches, the subject of the larceny, was placed on the counter of the store, to be used by the public in lighting their pipes and cigars in the room, and for their accommodation, and was taken therefrom by the defendant. The court was requested by the prisoner to charge the jury that if the matches were placed on the counter of the store-house for the use of customers, or the public, and they were taken while there for such use, the defendant was not guilty. The charge was refused, and the defendant excepted.

Larceny may be committed of property under the circumstances attached to the box of matches. The owner had not abandoned his right to them. They could only be appropriated in a particular manner and in a very limited quantity with his consent. Taking them by the boxful without felonious intent would have been a trespass, and with it, a larceny. The ownership was sufficiently proved.

The judgment is affirmed.

SECTION IV (*continued*).

Taking with Consent.

(*b*) LARCENY BY TRICK.

REX *v.* PEAR.

CROWN CASE RESERVED. 1779.

[*Reported* 2 *East P. C.* 685.]

JOHN PEAR was indicted for stealing a black mare, the property of Samuel Finch. On the 2d July, 1779, the prisoner hired the mare of Finch, who lived in London, for that day, in order to go to Sutton in Surrey, and told him that he should return at eight o'clock the same evening. Finch, before he let the prisoner the mare, inquired of him where he lived, and whether he were a housekeeper; to which he answered, that he lived at No. 25 in King Street, and was only a lodger. The prisoner not returning as he had promised, the prosecutor went the next day to inquire for him according to the direction he had given; but no such person was to be found. It turned out that the prisoner had in the afternoon of the same 2d of July sold the mare in Smithfield. In summing up this evidence to the jury, Mr. Justice Ashhurst, who tried the prisoner, told them that if they were of opinion that the prisoner hired the mare with an intent of taking the journey mentioned, and afterwards changed that intention, then as she was sold whilst the privity of contract subsisted, they ought to acquit the prisoner. But if they were of opinion that the journey was a mere pretence to get the mare into his possession, and that he hired her with an intention of stealing her, they ought to find him guilty: and he would save the point for the opinion of the judges. The jury found the prisoner guilty. This case underwent a great deal of discussion, and the judges delivered their opinion seriatim upon it, on the 4th February, 1780, at Lord C. J. De Grey's house; and on the 22d of the same month —

MR. BARON PERRYN delivered their opinion at the O. B. as follows:[2] (After stating the indictment, evidence, and finding of the jury as above

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[1] *Acc.* Com. *v.* Brown, 4 Mass. 580; Nichols *v.* People, 17 N. Y. 114. — ED.

[2] This judgment was settled and approved by several of the judges before it was delivered. (East's note.)

stated.) This case has been maturely considered by all the judges, and eleven [1] of them, who met for the purpose, delivered their opinions at large upon the subject: seven of them held the offence to be a clear felony; two of them were of opinion that it was not felony; and the other two entertained great doubts at the last; which doubts were founded upon two statutes which he should take notice of. Three out of the four dissenting judges agreed with the seven, that by the principles of the common law this was felony. But the doubts and opinions of those four judges were founded chiefly on the statutes 33 H. 8 and 30 G. 2, against obtaining goods by false tokens or false pretences. Two of the judges thought that as the delivery of the mare was obtained from the owner by means of asserting that which was false, viz. that the prisoner wanted to go a journey which he never intended to take at all; and as the two statutes before mentioned had made the offence of obtaining goods by false tokens or false pretences punishable as a misdemeanor only, and the stat. 33 H. 8, had distinguished the case of obtaining goods by false tokens from the case of obtaining goods by stealth; they were bound by those statutes to say, that the prisoner's offence was not felony. One of them also held that this was not felony by the common law; because there was no actual taking of the mare by the prisoner. But ten out of the eleven judges held it to be clear that the offence would have been felony by the common law, if the statutes had never existed; and seven of them held that it was not within or at all affected by the statutes of H. 8 or G. 2. That larceny was defined by Lord Coke to mean a felonious and fraudulent taking and carrying away of the goods of another. But it was settled by old authorities, that the taking need not be by force. If a carrier or porter received goods to carry from one place to another, and he opened the pack and sold them, that was felony; yet in that case there was no taking by force, but on a delivery by the owner. That the reason assigned for the determination in Kel. 82 was because the opening and disposing of them declared that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. So if A. cheapened goods of B.'s, and B. delivered them to A. to look at, and A. ran away with them, this was felony by the apparent intent of A. T. Ray. 276; Kel. 82. So if a horse were upon sale, and the owner let the thief mount him in order to try him, and the thief rode away with him, it was felony. Kel. 82. So in the case of one Tunnard, tried at the O. B. in October Sessions, 1729, who was indicted for stealing a brown mare of Henry Smith's: and upon the evidence it appeared, that Smith lived in the Isle of Ely, and lent Tunnard the mare to ride three miles; but he, instead of riding three miles only, rode her up to London and sold her: this was holden to be felony. And Lord C. J. Raymond, who tried the prisoner, left it to the jury to consider, Whether Tunnard rode away with her with an intent to steal her? and the jury found him guilty. That here the same directions were given to the jury by the learned judge who tried the prisoner, and the jury had given the same verdict. That even in the case of burglary, which the law defined to be the breaking into a house in the night time with intent to commit felony, if a man procured the door of a house to be opened by fraud, and by that means entered into the house through the door-way without any actual breaking, it had been adjudged to be burglary. That in all these cases the intention was the thing chiefly regarded, and fraud supplied the place of force. That what was the intention was a fact, which in every case must be left upon the evidence to the sound judgment of a jury. And in this case the jury had found that at the time when the prisoner obtained the possession of the mare, he intended to steal her. That the obtaining the possession of the mare, and afterwards disposing of her in the manner stated, was in the construction of law such a taking as would have made the prisoner liable to an action of trespass at the suit of the owner, if he had not intended to steal her. For she was delivered to the prisoner for a special purpose only, viz. to go to Sutton, which he never intended to do, but immediately sold her. That in this light the case would be similar to what was laid down by Littleton, sect. 71, who says, "If I lend to one my sheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have trespass notwithstanding the lending." That if in such a case trespass would have lain, there could be no doubt but that in this case, where the felonious intent at the time of obtaining the possession was found by the jury, that it was felony by the common law. That ten of the judges out of the eleven, therefore, were of opinion, that if a person obtained the delivery of a thing by fraud and falsehood, intending at the time that he so obtained the delivery to steal it; upon the principle of the common law and the adjudged cases which had been mentioned, if the statutes had not existed, his offence would be felony.[1] That the next question was, Whether this offence were within or at all affected by the statutes of H. 8 and G. 2.[2] Seven of the judges were of opinion that it was not. That the stat. of H. 8 was confined to the cases of obtaining goods in other men's names, by false tokens or counterfeit letters, made in any other man's name. The stat. of G. 2 extended that law to all cases where goods were obtained by false pretences of any kind. But both these statutes were confined to cases where credit was obtained in the name of a third person; and did not extend to cases where a man, on his own account, got goods with an intention to steal them. That besides, the seven judges held that neither of those statutes were intended to mitigate the common law, or to make that a less offence which was a greater before. On the contrary, the legislature, by those statutes, meant to inflict a severer punishment in the cases of fraud than the common law had done. That in many cases it was extremely difficult, and sometimes impossible to prove what the offender's original intention was. The circumstances evidencing a felonious intent, or the contrary, were so various, that Hale, p. 509, says it is impossible to prescribe them; they must be left to the consideration of a judge and jury. That where an original felonious intent appeared, the statutes did not apply. Where no such intent appeared, if the means mentioned in the statutes were made use of, the legislature had made the offender answerable criminally, who before by the common law of the land was only answerable civilly. That in the prisoner's case the intention was apparent, and the jury had rightly found that it was felonious. The crime then was felony, and of a nature which the statute law had made punishable with death.[1]

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[1] Mr. Justice Blackstone, the other judge, who was absent on account of illness, always held that it was felony. (East's note.)

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[1] On the debate of this case, ASHURST, J., said, "Wherever there is a real and bona fide contract and a delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and bona fide contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony. (East's note.)

[2] On the debate in this case Eyre, B., adverting to these statutes, said he doubted if there were not a distinction in this respect between the owner's parting with the possession and with the property in the thing delivered. That where goods were delivered upon a false token, and the owner meant to part with the property absolutely and never expected to have the goods returned again, it might be difficult to reach the case otherwise than through the statutes; aliter, where he parted with the possession only: for there if the possession were obtained by fraud, and not taken according to the agreement; it was on the whole a taking against the will of the owner; and if done animo furandi, it was felony. (MS. Buller, J.)

REGINA *v.* BUNCE.

OXFORD ASSIZES. 1859.

[*Reported* 1 *Foster & Finlason*, 523.]

THE prisoner, a gypsy woman, surrendered to take her trial upon a charge of stealing £10 9*s.* 4*d.*, and various articles, the property of John Prior, at Witney, on the 13th of January, 1859.

It had been usual, on this circuit, to charge offences of this nature as obtaining money by false pretences; but on this occasion, in deference to a suggestion thrown out by Crompton, J., in addressing the grand jury, the offence was charged as one of larceny, as consisting in obtaining possession of the goods by a trick or fraud.

R. Sawyer appeared for the prosecution.

Griffits defended the prisoner.

The prisoner was a gypsy woman who had succeeded in getting a large amount of property from the wife of the prosecutor, by pretending that she possessed supernatural powers and was able to procure for her dupe the sum of £170. On the 12th of January last, the prisoner went to the house of the prosecutor (who was out), saw his wife, and addressed her, saying, "Mrs. Prior, you are looking very ill. I have got something to tell you. There is some property left for you that you have been cheated out of, and I can get it for you." The prisoner then said that she had got a book, and she could raise the spirits and lay them if Mrs. Prior would put half a crown on a certain spot in the book which she pointed out. Mrs. Prior said to the prisoner that she had heard of such things, and she thought that spirits could be raised, and was induced to put some money in the book. The prisoner went away, and returned the next day, and said she had been working all night, and that her husband's money would not do, and she must have sovereigns; and she then required her to give her all the money she had got, and promised she would bring it back the next Monday, and also the sum of £170, which she said belonged to her. On these representations, the wife gave her all the money she could get, amounting to £10 9*s.* 4*d.* Mrs. Prior, who appeared to be a very nervous woman, and afraid, even now, to look at the prisoner in the dock, said she was so frightened at what the prisoner told her, that she felt she must go and get the money she wanted, and that she let her have it because she believed from what she said she could do her good or evil and was so afraid of her. When Mrs. Prior gave the prisoner the money, she required a shift to wrap the money up in, and also Mrs. Prior's shawl. These were given her, on her promise to return them on the Monday. The prisoner then wanted a cloth to fasten it all up in, saying she must bury it. This was given, and also Mrs. Prior's gold wedding-ring, a silver thimble, a brass ring, and five old silver coins, the prisoner saying she must have everything Mrs. Prior had got that was valuable. All these things were given to the prisoner on her promise to bring them all back on the Monday, together with the £170, and to have a cup of tea. The prisoner was to have £5 for her trouble. She never returned, and was taken into custody, on the 12th February, with Mrs. Prior's shawl upon her. On her cross-examination, Mrs. Prior said the prisoner always came when her husband was out, and that she had never told him anything about it. A friend of the prisoner's had since returned £5 to the prosecutor, and had promised £3 more.

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[1] *Acc.* Rex *v.* Semple, Leach, 691; State *v.* Woodruff, 47 Kas. 151; Justices *v.* People, 90 N. Y. 12; State *v.* Gorman, 2 N. & McC. 90; Starkie *v.* Com., 7 Leigh, 752. *Contra* Felter *v.* State, 9 Yerg. 397; but see Defrese *v.* State, 3 Heisk. 53; Holl *v.* State, 6 Baxt. 522 (statutory). — ED.

Griffits submitted that there was no case for the jury.

CHANNELL, B., after consulting CROMPTON, J., ruled that there was.

Griffits (*to the jury*) contended there was nothing to show that she had got possession of the goods with a felonious intent, but only with a view to practice her art as a witch, in which the prosecutrix, like many other people, was foolish enough to believe, and possibly the prisoner may have believed. And if this was the original intention, then, although it was afterwards altered, there would be no larceny.

CHANNELL, B., to the jury. It is for you to say whether or not the prisoner obtained possession of the goods with a felonious intent. If the original intention was as suggested, there would be no larceny; but if it was a mere trick to get the goods with no intention to return them it would be larceny.[1] *Verdict guilty.*

SMITH *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1873.

[*Reported* 53 *New York*, 111.]

ERROR to the General Term of the Supreme Court in the first judicial department to review judgment, affirming judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting plaintiff in error of the crime of grand larceny.

Upon the 19th day of July, 1872, the plaintiff in error called upon one Sarah March and informed her that her husband, Charles March, was arrested and locked up on a charge of striking a man over the head with a chair, and that her husband had sent him to her to get some money, twelve dollars, and unless she sent it he would be locked up all night. Not having any money, and, upon the solicitation of the prisoner, believing his statement to be true, she gave him a watch, chain, and a locket or cross, and two dollars in money, belonging to her husband, which property he was to pawn and give the ticket and money to her husband. The property was given to him and he left. The statement of the prisoner was false. Charles March, the husband, never had been arrested, never sent him for any money, and did not know him. The plaintiff in error appropriated the property so obtained to his own use.

The court charged the jury, in substance, that if they believed the evidence of the prosecution, and that the prisoner at the time of the taking had the felonious intent to appropriate the property, it was larceny, to which the prisoner's counsel excepted. The jury rendered a verdict of guilty.[2]

William F. Kintzing, for the plaintiff in error.

Benjamin K. Phelps, for the defendants in error.

ALLEN, J. The accused obtained the custody of the chattels and money of the prosecutor from his wife by a fraudulent device and trick, and for a special purpose, connected with the falsely represented necessities of the owner, with the felonious intent to appropriate the same to his own use. He did not pawn or pledge the goods, as he proposed to do, but did appropriate the same to his own use, in pursuance of the felonious intent with which he received them. This constitutes the crime of larceny. The owner did not part with the property in the chattels, or transfer the legal possession. The accused had merely the custody; the possession and ownership remaining in the original proprietor. The proposition is elementary that larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi.* Per Cowen, J., Cary *v.* Hotailing, 1 Hill, 311; Am. Crim. Law, by Wharton, § 1847, *et seq.*; Reg. *v.* Smith, 1 C. & K. 423; Reg. *v.* Beaman, 1 C. & M. 595; Reg. *v.* Evans, id. 632.

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[1] See Cantwell *v.* Peo. (Ill.), 28 N. E. 964. — ED.

[2] Arguments of counsel are omitted.

The rule is, that when the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, not parted with, in the first proprietor. It is stated that if a watchmaker steal a watch delivered him to clean, or if a person steals clothes delivered for the purpose of being washed, or guineas delivered for the purpose of being changed into half guineas, or a watch delivered for the purpose of being pawned, the goods have been thought to remain in the possession of the proprietor, and the taking them away held to be a felony. 1 Hawk. P. C. 33, § 10; 2 Russell on Crimes, 22. A distinction is made between a bare charge or special use of the goods, and a general bailment; and it is not larceny if the owner intends to part with the property, and deliver the possession absolutely, although he has been induced to part with the goods by fraudulent means. If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offence of the party obtaining them will not be larceny, but that of obtaining goods by false pretences. Ross *v.* People, 5 Hill, 294; Lewer *v.* Commonwealth, 15 S. & R. 93; 2 Russell on Crimes, 28. Here the jury have found the intent to steal at the time of taking, which is all that is required to constitute larceny, where the mere possession is obtained by fraud or trick. Wilson *v.* People, 39 N. Y. 459; People *v.* Call, 1 Den. 120; People *v.* McDonald, 43 N. Y. 61.

The conviction was right, and the judgment must be affirmed.

All concur. *Judgment affirmed.*[1]

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[1] *Acc.* Soltau *v.* Gerdau, 119 N. Y. 380; State *v.* McRae, 111 N. C. 665; State *v* Lindenthall, 5 Rich. 237. — ED.

COMMONWEALTH *v.* RUBIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[*Reported* 165 *Mass.* 453.]

HOLMES, J. The defendants have been convicted on a count for larceny of a horse, the property and in the possession of one Perkins, in Natick, in the county of Middlesex. The question presented by the exceptions is whether the evidence justified a conviction. The horse had been bought for Perkins, and a boy had been engaged by Perkins's servant to take it from the sale stable in Boston to Framingham. On his way the boy fell in with the defendants driving, and they took him into their wagon. While driving, they said they would deliver the horse for him. He assented. They paid him what he was to receive from Perkins, and he left the horse with them at Wellesley, in the county of Norfolk. The defendants misappropriated the horse which afterwards was found on their premises at Natick. The boy was innocent.

If the boy had converted the horse, inasmuch as it had been delivered to him by a third person and had not reached its destination, the offence would not have been larceny by reason of the ancient anomaly sanctioned by Commonwealth *v.* King, 9 Cush. 204, and explained in Commonwealth *v.* Ryan, 155 Mass. 523. But that is in consequence of the ambiguous attitude of the law toward his custody, which prevents it from regarding his conversion as a trespass. There is no such trouble when a third person converts the chattel. It is larceny equally when he takes the thing from a bailee, from a servant, or from the owner himself. Commonwealth *v.* O'Hara, 10 Gray, 469. Commonwealth *v.* Lawless, 103 Mass. 425. Commonwealth *v.* Sullivan, 104 Mass. 552. Of course the title had passed to Perkins, and for most purposes the possession also, and this being so, either there is no question of pleading or variance, or the statute disposes of it, if a larceny is proved. Pub. Sts. c. 214, § 14.

But the horse was delivered to the defendants, and the question remains whether their conduct falls under any recognized exception to the requirement of a taking by trespass. One such exception is when the possession of a chattel, but not the title, is gained by a trick or fraud with intent to convert it. Commonwealth *v.* Barry, 124 Mass. 325. Commonwealth *v.* Lannan, 153 Mass. 287, 289. It may be assumed that acceptance of a chattel upon a contract or promise, with intent not to carry out the promise but to convert the chattel, is within this exception. Commonwealth *v.* Barry, *ubi supra.* 2 Bish., Crim. Law, (8th ed.) § 813. So that the question is narrowed to whether there was any evidence of intent at the time when the defendants received the horse, the only fact bearing upon the matter being what they did shortly afterwards. This has been settled, so far as precedent can settle it, from very early days, although the principle has been disguised in an arbitrary seeming form. The rule that, if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*, although now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct. It seems to have applied to all cases where intent was of importance. Hill, J., in Y. B. 11 Hen. IV. 75, pl. 16; 13 Ed. IV. 9, pl. 5. The Six Carpenters' case, 8 Co. Rep. 146 a, b. See Y. B. 9 Hen. VI. 29, pl. 34. (Compare as to burglary, 1 Hale P. C. 559, 560; Stark. Cr. Pl. 177; 2 East P. C. 509, 510, 514.) This rule was mentioned in the well known case in which it was decided that a carrier breaking bulk is guilty of felony: Y. B. 13 Ed. IV. 9, pl. 5; and in the time of Charles II. even was thought to explain the decision there. J. Kel. 81, 82. It is true that this explanation hardly can be accepted. 2 East P. C. 696. It was repudiated by the judges who decided the case. But seemingly the reason for the repudiation was that at that time the intent of the bailee was supposed to be always immaterial, and that as yet, and indeed as late as Lord Coke and Lord Hale, no exception had been made to the general rule that delivery by the owner prevents a conversion from being felony. Y. B. 13 Ed. IV. 9, pl. 5. See 8 Co. Rep. 146 b; 1 Hale P. C. 504; Y. B. 12 Ed. IV. 8, pl. 20; 21 Ed. IV. 75, 76, pl. 9. Probably the first suggestion that intent can be important when there is a bailment is in J. Kel. 81, 82, just cited, and there are many cases in the past where the intent of the bailee was open to question but was not tried: e. g. Raven's case, J. Kel. 24; Tunnard's case, 2 East P. C. 687, 694. Since the law has changed or has been developed, the carrier's case in 13 Ed. IV. 9, sometimes has tended to make confusion. 2 East P. C. 695–698, c. 16, § 115. The rule as to trespass *ab initio* having been held not to apply to bailments when the intent of the bailee made no difference, still was not applied to them after the intent was held material. In this way it became ossified and took on the appearance of a limited and technical rule of a substantive law. See Esty *v.* Wilmot, 15 Gray, 168; Smith *v.* Pierce, 110 Mass. 35, 38. But since it has been settled that the intent may be decisive as to larceny, the less extreme and more rational proposition which led to the technical rule, namely, that the subsequent conduct is some evidence of the original intent, has been acted on frequently in England by leaving the case to the jury when tne whole evidence consisted of an ambiguous receipt and a subsequent conversion. J. Kel. 81, 82. Pear's case, 2 East P. C. 685, 687. The King *v.* Charlewood, 1 Leach (4th ed.) 409; S. C. 2 East P. C. 689. Leigh's case, 2 East P. C. 694; S. C. 1 Leach, (4th ed.) 411 note (a). Armstrong's case, 1 Lewin, 195. Spence's case, 1 Lewin, 197. Rex *v.* Gilbert, 1 Moody C. C. 185. The

Queen *v.* Cole, 2 Cox C. C. 340. See also Chisser's case, T. Raym. 275, 276, and 2 East P. C. 697, citing 2 MS. Sum. 233. Cases like those mentioned in 1 Hawk. P. C. Larceny, c. 33, § 10, of a watchmaker stealing a watch delivered to him to clean, and the like, cannot be explained on the ground suggested, that the possession remains in the owner, but it would seem must be accounted for on the same ground as the last. See 2 East P. C. 683, 684, c. 16, § 110.

In the case at bar, the conversion followed hard upon the receipt of the horse, and the inference is not unnatural that the intent existed from the beginning, as it is proved to have existed a very short time afterwards. There is the less cause for anxiety upon the point, in view of the merely technical distinction between larceny and embezzlement.

Of course, if the defendants received the horse with felonious intent in Norfolk, and carried it away into Middlesex, they could be indicted in the latter county. *Exceptions overruled.*

SECTION IV (*continued*).

(*c*) DELIVERY BY MISTAKE.

REGINA *v.* MIDDLETON.

CROWN CASE RESERVED. 1873.

[*Reported Law Reports,* 2 *Crown Cases Reserved,* 38.]

CASE stated by the Common Sergeant of London.

At the session of the Central Criminal Court held on Monday, the 23d of September, 1872, George Middleton was tried for feloniously stealing certain money to the amount of £8 16*s.* 10*d.* of the moneys of the Postmaster-General.

The ownership of the money was laid in other counts in the Queen and in the mistress of the local post-office.

It was proved by the evidence that the prisoner was a depositor in a post-office savings-bank, in which a sum of 11*s.* stood to his credit.

In accordance with the practice of the bank, he duly gave notice to withdraw 10*s.*, stating in such notice the number of his depositor's book, the name of the post-office, and the amount to be withdrawn.

A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at Notting Hill to pay the prisoner 10*s.* He presented himself at that post-office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for £8 16*s.* 10*d.*, and placed upon the counter a £5 note, three sovereigns, a half-sovereign, and silver and copper, amounting altogether to £8 16*s.* 10*d.* The clerk entered the amount paid, viz., £8 16*s.* 10*d.* in the prisoner's depositor's book and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and upon his being asked for his depositor's book, said he had burnt it. Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny, because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up.

A verdict of guilty was recorded, and the learned Common Sergeant reserved for the opinion of the Court for Crown Cases Reserved the question whether under the circumstances above disclosed the prisoner was properly found guilty of larceny.

Nov. 23, 1872. The Court [Kelly, C. B. Martin, B., Brett, Grove, and Quain, JJ.] reserved the case for the opinion of all the judges.

Jan. 25, 1873. The case was argued before Cockburn, C. J., Bovill, C. J., Kelly, C. B., Martin, Bramwell, Pigott, and Cleasby, BB., Blackburn, Keating, Mellor, Brett, Lush, Grove, Quain, Denman, and Archibald, JJ.

No counsel appeared for the prisoner.

Sir J. D. Coleridge, A. G. (*Metcalfe* and *Slade* with him), for the prosecution.

The arguments and the cases cited sufficiently appear from the judgments.

Jan. 28. PER CURIAM. The majority of the judges think that the conviction ought to be affirmed, for reasons to be stated hereafter.

June 7. The following judgments were delivered: —

BOVILL, C. J., read the judgment of Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., as follows:[1] —

We agree that according to the decided cases it is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief; and that, therefore, at common law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

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[1] Part of this opinion is omitted.

It is, to say the least, very doubtful whether this doctrine is either wise or just; and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, &c., shall be guilty of larceny, without reference to the subtle exceptions engrafted by the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now, we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in Russell on Crimes, 4th ed. vol. 2, p. 207; perhaps those that most clearly raise the point are Rex *v.* Davenport, 2 Russell on Crimes, 4th ed. at p. 201, and Rex *v.* Savage, 5 C. & P. 143, 2 Russell on Crimes, 4th ed. at p. 201.

In the present case the finding of the jury, that the prisoner, at the moment of taking the money, had the *animus furandi* and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows: At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear from the very nature of the thing that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now, it is established that where a bargain between the owner of the chattel has been made with another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber in Clough *v.* London and

Northwestern Ry. Co., Law Rep. 7 Ex. 26, at pp. 34, 35, where it is said, "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is Reg. *v.* Prince, Law Rep. 1 C. C. 150, which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged check payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case the property still remains that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an innocent purchaser could have held the property. But let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger, in Chanter *v.* Hopkins, 4 M. & W. at p. 404, when he says: "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake and had then the guilty intent, the *animus furandi.*

But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, though the intention was inoperative, and no property passed. In almost all the cases on the subject, the property had actually passed, or at least the court thought it had passed; but two cases, Rex *v.* Adams, 2 Russell on Crimes, 4th ed. at p. 200, and Rex *v.* Atkinson, 2 East P. C. 673, appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if Rex *v.* Davenport, 2 Russell on Crimes, 4th ed. at p. 201, and the others involving the same principle are law; and though if a long series of cases had so decided, we should think we were bound by them, yet we think that in a court such as this, which is in effect a court of error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

Bovill, C. J., delivered the judgment of himself and Keating, J., as follows: —

The proper definition of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, from any place, without any color of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner. And the question for our consideration is, whether the facts of the present case bring it within that definition.

Under the act for establishing post-office savings-banks, 24 & 25 Vict. c. 14, deposits are received at the post-offices authorized by virtue of that act, for the purpose of being remitted to the principal office (§ 1). By § 2 the Postmaster-General is to give an acknowledgment of such deposits, and by the 5th section all moneys so deposited with the Postmaster-General are forthwith to be paid over to the Commissioners for the Reduction of the National Debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the Postmaster-General. By § 3 the authority of the Postmaster-General for such repayment shall be transmitted to the depositor, who is to be entitled to repayment at a post-office within ten days.

It appears to us that the moneys received by the postmasters at their respective offices, by virtue of this act, are the property of the Crown or of the Postmaster-General, and that neither the postmasters, nor the clerks at the post-offices, have any power or authority either general or special, to part with the property in, or even the possession of, the moneys so deposited, or any part of them, to any person except upon the special authority of the Postmaster-General.

In this case the prisoner had received a warrant or authority from the Postmaster-General, entitling him to repayment of 10*s.* (being part of a sum of 11*s.* which he had deposited) from the post-office at Notting Hill, and a letter of advice to the same effect was sent by the Postmaster-General to that post-office, authorizing the payment of the 10*s.* to the prisoner.

Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the £5 note, three sovereigns, the half-sovereign, and silver and copper, amounting to £8 16*s.* 10*d.*, which the clerk placed upon the counter, and which was taken up by the prisoner.

In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail bags by pretending to be the mail guard, as in Rex *v.* Pearce, 2 East P. C. p. 603; the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in Reg. *v.* Kay, Dears. & B. Cr. C. 231; 26 L. J. (M. C.) 119 (where Rex *v.* Pearce, 2 East P. C. p. 603, was relied upon in the judgment of the court); and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in Reg. *v.* Jones, 1 Den. Cr. C. 188, and in Reg. *v.* Gillings, 1 F. & F. 36, were all held to be larceny.

The same principle has been acted upon in other cases, where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi;* for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in Rex *v.* Longstreeth, 1 Mood. Cr. C. 137; or obtaining goods through the misdelivery of them by a carman's servant, through mistake, to a wrong person, who appropriated them *animo furandi*, as in Reg. *v.* Little, 10 Cox Cr. C. 559, were, in like manner, held to amount to larceny.

In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant, to whom the property had been intrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny.

The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods; for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in Reg. *v.* Adams, 1 Den. Cr. C. 38, the payment of money by a banker's cashier on a check which turned out to be a forgery, as in Reg. *v.* Prince, Law Rep. 1 C. C. 150, and the delivery up of pledges by a pawnbroker's manager by mistake and through fraud, as in Rex *v.* Jackson, 1 Mood. Cr. C. 119, are instances of this kind, and where the intent voluntarily to part with the property in the goods, by a person who had authority to part with the property in them, prevented the offence being treated as a larceny.

In the present case, not only had the postmistress or her clerk no power or authority to part with the property in this money to the prisoner, but the clerk, in one sense, never intended to part with the £8 16*s.* 10*d.* to the person who presented an order for only 10*s.*, and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not, really intended for him; yet, with a full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use.

There was, therefore, as it seems to us, a wrongful and fraudulent taking and carrying away of the whole of this money by the prisoner, without any color of right, *animo furandi*, and against the will of the real owner; and for these reasons, and upon the authorities before stated, we think the prisoner was properly convicted of larceny.[1]

Pigott, B. I agree in the judgment of the majority of the court, except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not, under the circumstances here, prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent, because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner.

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[1] Kelly, C. B., delivered an opinion concurring with that of Bovill, C. J.

The case states that the clerk placed the money on the counter. He then entered the amount of it in the prisoner's book and stamped it. This, no doubt, gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error, and that the money could not really be intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it, and in fact to steal the money. The interval afforded him the opportunity of conceiving, and he did in fact conceive, the *animus furandi*, while as yet he had not got the money in his manual possession.

The dividing line may appear to be a fine one, but it is, I think, very distinct and well defined in fact, for it was with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter was required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter, intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed.

I desire to adhere to the law as stated in the 3d Institute, page 110: "The intent to steal must be before it cometh to his hands or possession, for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the *animus furandi* while the money was yet on the counter, and that at the moment of taking it up he knew the money to be the Postmaster-General's. The case is therefore very much like that of a finder who, immediately on finding it, knows, or has the means of knowing, the owner, yet determines to steal it. 2 Russell on Crimes, 4th ed. p. 169. The same facts satisfy the requirements in the definition of larceny, that the taking must be *invito domino*. The loser does not intend to be robbed of his property, nor did the clerk in this case, and the prisoner's conduct is unaffected by the clerk's apparent consent in ignorance of its real nature. I affirm the conviction.

BRAMWELL, B. As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority, if the case turned on its own particular circumstances and no principle was involved. But in my opinion great and important principles not only of our law but of general jurisprudence arise here, on which I feel bound to state my views.

It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law, for the prevention and remedy of wrongs. It is also a good rule not to make that a crime which is the act, or partly the act, of the party complaining. *Volenti non fit injuria*: As far as he is willing, let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English common law. Obtaining goods by false pretences was no offence at common law. Ordinary cheating was not. Embezzlement, &c., by servants was not larcenous. Breaches of trust by trustees and bailees were not. So also fraudulently simulating the husband of a married woman, and having connection with her, was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be *invito domino.*

Whether this law is good or bad is not the question. We are to administer it as it is. I think those statutes that have made offences of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence. But something was to be said in favor of the old law, viz., that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter, perhaps, may properly be made a crime; but it is a different crime from the other taking.

I say, then, that on principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be *invito domino.* That does not mean contrary to or against his will, but without it. All he need be is *in*vitus. This accounts for how it is that a finder of a chattel may be guilty of larceny. The dominus is invitus. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistent with this, but which are brought within the rule indeed, but by reasoning which ought to have no place in criminal law. I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package, and cases where possession was fraudulently obtained, *animo furandi*, from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk re-vested the possession in the owner; and in the other case the obtaining of possession was a fraud, and so null; and that therefore in such cases the possession reverted to or remained in the true owner, and so there was a taking *invito domino.* So also cases where the custody is given to the alleged thief, but not possession or property, as when the price of a chattel delivered is to be paid in ready money. Reg. *v.* Cohen, 2 Den. Cr. C. 249. These are not exceptions to the rule, but are brought within it by artificial, technical, and unreal reasoning. But where the dominus has voluntarily parted with the possession, intending to part with the property in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so, nor whatever may be the mistake he committed; because in such case the dominus is not invitus. So also where the possession has been parted with in such way as to give the bailee a special property. See 2 Russell on Crimes, 4th ed. p. 191, citing 2 East P. C. p. 682; Reg. *v.* Smith, 2 Russell on Crimes, 4th ed. p. 191; Reg. *v.* Goodbody, 8 C. & P. 665. It is not necessary that the property should pass, the intent it should is enough. See Rex *v.* Coleman, 2 East P. C. 672.

But it is argued that here there was no intent to part with the property, because the post-office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described and give to Middleton what did not belong to him, yet he intended to do the act he did. What he did he did not do involuntarily nor accidentally, but on purpose. See what would follow from such reasoning. A. intends to kill B.; mistaking C. for B., he shoots at C. and kills him. According to the argument, he is not guilty of intentional murder; not of B., for he has not killed him; not of C., for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man in the dark gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is no rape, because it is not without her consent, yet she did not intend that a man not her husband should have connection with her. I have noticed this above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant.

To proceed with the present matter: If the reasoning as to not intending to give this money is correct, then, as it is certain that the post-office clerk did not intend to give Middleton 10*s.*, it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A. tells B. he has ordered a wine merchant to give B. a dozen of wine; B. goes to the wine merchant, *bonâ fide* receives, and drinks a dozen of wine. After it is consumed the wine merchant discovers he gave B. the wrong dozen, and demands it of B., who, having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B., as B. could plead the wine merchant's leave and license. But it is said that if B. knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito domino;* so that whether the dominus is invitus or not depends, not on the state of his own mind, but of that of B.

It is impossible to say that there was a taking here sufficient to constitute larceny because the money was picked up, but that if it had been put in the prisoner's hand there was not such a taking.

But for the point, then, I am about to mention, I submit the dominus was not invitus, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man, maybe what he did ought to be made criminal, but his act was different from a privy or forcible taking; he was led into temptation; the prosecutor had very much himself to blame, and I certainly think that Middleton, if punished, should be so on different considerations from those which should govern the punishment of a larcenous thief.

But a point is made for the prosecution on which I confess I have had the greatest doubt. It is said that here the dominus was invitus; that the dominus was not the post-office clerk, but the Postmaster-General or the Queen; and that therefore it was an unauthorized act in the post-office clerk, and so a trespass in Middleton *invito domino.* I think one answer to this is, that the post-office clerk had authority to decide under what circumstances he would part with the money with which he was intrusted. But I also think that, for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the dominus within this rule, at least when acting *bonâ fide.* It is unreasonable that a man should be a thief or not, not according to his act and intention, but according to a matter which has nothing to do with them, and of which he has no knowledge.

According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse, and he by mistake takes a sovereign, and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, the cabman is guilty of larceny, but not if the husband gives it. It is said that there is no great harm in this; that a thief in mind and act has blundered into a crime. I cannot agree. I think the criminal law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain, and it is to be remembered that we must hold that to be law now which would have been law when such a felony was capital. Besides, juries are not infallible, and may make a mistake as to the *animus furandi*, and so find a man guilty of larceny when there was no theft and no *animus furandi.* Moreover, Reg. *v.* Prince, Law Rep. 1 C. C. 150, is contrary to this argument, for there the banker's clerks had no authority to pay a forged check if they knew it; they had authority to make a mistake, and so had the post-office clerk. And suppose in this case the taking had been *bonâ fide*, — suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum was given him, — would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained.[1]

Cleasby, B.[2] The cases establish that, where there is a complete dealing or transaction between the parties for the purpose of passing the property, and so the possession parted with, there is no taking, and the case is out of the category of larceny.

I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text-book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases show, no doubt, beyond question that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not show the converse, viz., that when the property does not pass there is larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case than expressly decide it. For how can there be a taking against the will of the owner where the owner hands over the possession, intending by doing so to part with the entire property?

As far as my own experience goes, many of the cases of fraudulent pretences which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretence that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct, upon cases reserved for the judges, that in such cases there is no larceny. In Reg. *v.* Adams, 1 Den. Cr. C. 38, the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker: —

> Have the goodness to give the bearer ten good thick sides of bacon, and four good, showy hams, at the lowest price. I shall be in town on Thursday next, and will come and pay you.
>
> Yours respectfully, T. Parker.

Aston, believing the note to be the genuine note of Parker (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offence was larceny, the judges were all of opinion that the conviction was wrong. Rex *v.* Coleman, 2 East P. C. p. 672, is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbor for it; and it was held not to be a case of larceny. Rex *v.* Atkinson, 2 East P. C. p. 673, was a similar one, and the prisoner was convicted; but on a reference to the judges after conviction, all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner.

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[1] The remainder of the opinion is omitted. Martin and Cleasby, BB., and Brett, J., delivered concurring opinions.

[2] Part only of the opinion is given.

I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and by mistake, a larger quantity than was paid for may be put in the package and he may take them away. Or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the *animus furandi?* I think not; I think such cases are out of the area of felony, and therefore the *animus furandi* is inapplicable, and ought not to be left to the jury. And any conclusion, founded upon the finding of the jury upon a question which ought not to be left to them must be erroneous, because the foundation is naught. I think the conviction was against law and ought to be quashed.

Conviction affirmed.[1]

WOLFSTEIN *v.* PEOPLE.

SUPREME COURT OF NEW YORK. 1875.

[*Reported* 6 *Hun*, 121.]

WRIT of error to the Court of General Sessions for the city and county of New York, to review the conviction, of the plaintiff in error, of the crime of grand larceny.

Charles W. Brooke, for the plaintiff in error.

Benjamin K. Phelps, for the defendants in error.

WESTBROOK, J. The plaintiff in error having been convicted in the Court of General Sessions of the city and county of New York during the month of April, 1875, of the crime of grand larceny, has, by writ of error, brought the proceedings into this court for review.

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[1] But see Com. *v.* Hays, 14 Gray, 62. — ED.

By the evidence given upon the trial and the verdict of the jury, the following facts were established: The prisoner was the possessor of a draft, dated February 15th, 1875, drawn payable to his order by one L. Boell, on Heidelbach, Frank, & Co., for the sum of seventy-four dollars in gold. It was accepted by the parties upon whom it was drawn, on the 9th day of March, 1875, and made payable on demand at the German American Bank. On the day of its acceptance it was presented by the accused at the bank for payment, and the paying teller, who was unable to read the French language in which it was written, and who read the figures upon the draft as $742, paid to the prisoner that sum of money in gold. The party to whom the money was paid, knowing that he was entitled to receive only seventy-four dollars, took the larger sum ($742) thus paid to him by mistake, and, without disclosing the error, concealed and denied the over-payment, and feloniously appropriated it to his own use.

The case then presents this question: If a party who receives from another money to which he knows he is not entitled, and which he knows has been paid to him by mistake, should conceal such over-payment and appropriate the money to his own use, intending thus to cheat and defraud the owner thereof, would he or not be guilty of the crime of larceny? If it be answered that he would not, can the element needed to make it such, and which is absent, be pointed out? The money, in excess of that which he is entitled to receive, is taken without the owner's consent, and that which is thus taken is appropriated to the taker's use with intent, fraudulently, to deprive the owner thereof. These two elements make the crime of theft, and they are both present here.

It will not do to say that the owner parts with the property voluntarily, and therefore there is no unlawful taking. There may be the physical act of the owner handing that which is his to another, but there is absent the intellectual and intelligent assent to the transfer, upon which the consent must necessarily depend. Where money or property is obtained from the owner by another upon some false pretence, for a temporary use only, with the intent to feloniously appropriate it permanently, the taking, though with the owner's consent, is larceny. Wherein do the cases differ? In both there is a physical delivery by the owner, and in both the taker knows that it was given for no such purpose as he has in mind, and yet he, unlawfully and wickedly, in both cases, seeks to deprive the owner thereof. If the one case is larceny, the other is also.

So, too, the finder of property, if he knows the owner and conceals such finding, and appropriates it to his own use, with intent to deprive the owner thereof, is guilty of larceny. So in this case, if the prisoner found, on counting the money, that in his possession to which he knew he was not entitled, and which he also knew the owner did not intend to deliver to him, he was bound to return it to the owner, and if he did not, but concealed its possession and sought to deprive the owner thereof, the crime was complete.

From the evidence in this case, and the verdict rendered, we are bound to assume that the mistake was noticed and discovered by the prisoner at some time. If the over-payment was observed in the bank when the money was delivered, and the prisoner took it with the intent to cheat and defraud the owner, the crime was then complete. If, however, the error was not then noticed, but was afterward, and the intent of felonious appropriation was then formed and executed, the legal guilt of the prisoner was at that time incurred. As in the case of the finder of the lost article, the original taking may be lawful, but legal accountability as for crime begins when the owner is discovered and the intent formed unlawfully and feloniously to deprive him of the possession thereof.

The questions which the case involves, and the points to be found by the jury before a verdict of guilty could be rendered, were properly stated by the recorder, and the finding was well warranted by the testimony.

The request to charge, made by the counsel of the prisoner at folio eighty-two, was amended, and as amended was charged. There is no error here. The conviction of the prisoner is therefore affirmed.

DAVIS, P. J., and DANIELS, J., concurred.[1]

Conviction affirmed.

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[1] See Com. *v.* Eichelberger, 119 Pa. 254. — ED.

REGINA *v.* LITTLE.

CENTRAL CRIMINAL COURT. 1867.

[*Reported* 10 *Cox C. C.* 559.]

GEORGE COHEN LITTLE and William Eustace were charged with stealing 276 yards of carpet, the property of the Midland Railway Company.

Three bales of carpet were entrusted to Froome, a carman in the service of the Midland Railway Company, for delivery to Easten & Co., Addle Street. From something Froome heard in Addle Street he went to 7 Philip Lane, which leads out of Addle Street. There was no name up at No. 7, but it appeared as if it had been newly done up. At No. 7 Froome saw the prisoner Little and asked him whether that was Easten's of Addle Street. Little said, "Yes." Froome told him he had three trusses of carpet, and showed him the way-bill, which indicated that three bales marked E. 959–61 were to be delivered to Easten & Co. of Addle Street. Little told him to bring them in, and they were brought in and signed for by "T. C. Little." Eustace appeared to have rented the premises on which the goods were left, and became acquainted with the fact of their being in his house shortly after they were so left, and according to his own account had sold them to a man from whom he had received no money, although by his own statements to a witness he had said they had been left at this place in mistake, and did not belong to him.

Sleigh, on behalf of Eustace, submitted that there was no case of larceny made out, — the Railway Company, in whom the property was laid, having parted not only with the possession, but also with the property in the goods, and no trick having been shown to have been used by Eustace in order to get possession of them.

Poland contended that the Railway Company, having authority to deliver to Easten & Co., had no power to part with the property in the goods to any other parties; that the mistake of the carman in leaving them at the wrong premises did not deprive the company of their property in them; and that the subsequent conversion of them by Eustace to his own purposes was in fact a larceny of the goods of the company, just as much as if he had taken them out of the cart himself.

Besley, on the same side, argued that as the goods came into the possession of Little, he by accepting possession of them might be deemed a bailee for the owner, and that directly Eustace became acquainted with the circumstances and co-operated with him he was accessary with him as bailee; and then if, contrary to that bailment, they jointly converted the goods to their own purposes, a case of larceny would be established. He referred to Regina *v.* Robson, 9 Cox C. C. 29.

The RECORDER said he should leave the case to the jury, not upon the ground that the prisoners were bailees, but that the property in the goods had not been parted with. The carman had the limited authority to part with them to Easten & Co. only, and by leaving them in mistake the property was not really parted with.

Guilty.

SECTION V.

Transfer of Title.

REX *v.* MOORE.

CROWN CASE RESERVED. 1784.

[*Reported Leach* (4*th ed.*), 314.]

THIS was a case reserved for the opinion of the twelve judges by Mr. Sergeant Adair, Recorder, at the Old Bailey, in April Session, 1784, upon the trial of an indictment for stealing twenty guineas, and four pieces of foreign gold coin called doubloons, the property of John Field, in the dwelling-house of John Brown.

The material circumstances of this case, as they appeared in evidence, were as follow: The prosecutor, John Field, a soldier, just returned from the war in America, was walking along James Street, Covent Garden, when a stranger joined company with him. As they walked in friendly conversation with each other down Long Acre, the stranger suddenly stopped and picked up a purse which was lying at a door. After they had proceeded about forty yards, "Come," says the stranger, "we will go and drink a pot of porter, and see what we have picked up." The prosecutor was persuaded to comply; and they accordingly went into a private room in an adjacent public house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed "W. Smith," for £210 "for one brilliant diamond-cluster ring," and from the other end he pulled out the ring itself. A conversation ensued upon the subject of their good fortune, during which time the prisoner, Humphrey Moore, entered the room; and being shewed the ring, he praised the beauty of its lustre, and offered to settle the division of its value. Upon the stranger's lamenting that he had no money about him, the prisoner asked the prosecutor if he had any. The prosecutor replied that he had forty or fifty pounds at home. "That sum will just do," said the prisoner. A coach was immediately called, and all three were driven to the prosecutor's lodgings at Chelsea. The prosecutor and the stranger went into the house together, leaving the prisoner at the Five Fields. The prosecutor took his money from his bureau, put it into his pocket, and returned with the stranger to a public house in the Five Fields, Chelsea, kept by John Brown, where they again met the prisoner, who said, "I will give you your share of the ring, if you will be content till to-morrow." The prosecutor put down twenty guineas and four doubloons, which the stranger took up, and in return gave the prosecutor the ring, desiring that he would meet him at the same place on the next morning at nine o'clock, and promising that he would then return the twenty guineas and the four doubloons to the prosecutor, and also one hundred guineas for his share of the ring. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the parties came. The ring was of a very trifling value.

It was left with the jury to consider whether the prisoner and the other man were not confederated together, for the purpose of obtaining money on pretence of sharing the value of the ring, and whether he had not aided and assisted the other man to obtain the money by the means that were used for that purpose. And the jury were of opinion that the prisoner was confederating with the person unknown for the purpose of obtaining the money by means of the ring, and did therefore aid and assist the person unknown in obtaining the twenty guineas and the four doubloons from the prosecutor. They accordingly found him guilty of stealing, but not in the dwelling-house, subject to the opinion of the twelve judges whether it was felony.

On the first day of Michaelmas Term, 1784, all the judges, except Lord Mansfield, assembled at Lord Loughborough's chambers to consult upon this case; and in the December Session following, Mr. Justice WILLES delivered their opinion at the Old Bailey to the following effect: all the judges agreed that in considering the nature of larceny it was necessary to attend to the distinction between the parting with the possession only, and the parting with the property; that in the first case it is felony, and in the last case it is not. Upon the circumstances of the present case two of the judges[1] were of opinion that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced on it, and therefore that he had voluntarily parted with the property as well as with the possession of the doubloons. But nine of the judges were clearly of opinion that it was felony, for they thought the twenty guineas and the four doubloons were deposited in the nature of a pledge till the half of the supposed value of the ring was paid to the prosecutor, and not as a loan; and therefore he had parted with the possession only, and not with the property, — more especially as to the doubloons, which he clearly understood were to be returned the next day in specie; and they could not distinguish this case from The King *v.* Patch in this court in February Session, 1782, and the King *v.* Pear, in September Session, 1779. The majority of the judges, therefore, were of opinion that this case had been properly left to the jury, and that the prisoner was guilty of felony.

The prisoner was accordingly transported.

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[1] Lord LOUGHBOROUGH, and SKINNER, C. B.

REX *v.* ATKINSON.

Crown Case Reserved. 1799.

[*Reported* 2 *East P. C.* 673.]

James William Atkinson was indicted for stealing two bank-notes, the property of William Dunn, against the statute. It appeared that the prisoner sent one Dale (to whom he was unknown) with a letter directed to Dunn; bidding Dale to tell Dunn that he brought the letter from Mr. Broad, and to bring the answer to him (the prisoner) in the next street, where he would wait for him. Dale accordingly carried to Dunn the letter, which was written in the name of Broad, a friend of Dunn's, soliciting the loan of £3 for a few days, and desiring that the money might be inclosed back in the letter immediately. Dunn thereupon sent the bank-notes in question, inclosed in a letter directed to Broad, and delivered the same to Dale, who delivered them to the prisoner as he was first ordered. The letter turned out to be an imposition. It was objected at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And on reference to the judges after conviction, all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner; and that this case came within the Stat. 33 H. 8. c. 1, against false tokens, which particularly speaks of counterfeit letters.[1]

REGINA *v.* PRINCE.

Crown Case Reserved. 1868.

[*Reported Law Reports* 1 *Crown Cases Reserved*, 150.]

The following case was stated by the Common Sergeant: —

The prisoner was tried before me at the August session of the Central Criminal Court on an indictment charging him, in the first count, with stealing money to the amount of £100, the property of Henry Allen; in the second count, with receiving the same, knowing it to have been stolen; and in two other counts the ownership of the money was laid in the London and Westminster Bank.

It appeared in evidence that the prosecutor, Henry Allen, had paid moneys amounting to £900 into the London and Westminster Bank on a deposit account in his name, and on the 27th of April, 1868, that sum was standing to his credit at that bank. On that day the wife of Henry Allen presented at the bank a forged order purporting to be the order of the said Henry Allen, for payment of the deposit, and the cashier at the bank, believing the authority to be genuine, paid to her the deposit and interest in eight bank notes of £100 each, and other notes. Among the notes of £100 was one numbered 72,799, dated the 19th of November, 1867.

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[1] *Acc.* Rex *v.* Colman, Leach (4th ed.) 303 *n.*; Kelly *v.* People, 6 Hun, 509; Kellogg *v.* State, 26 Oh. St. 15. See Reg. *v.* Middleton, L. R. 2 C. C. 38, *ante.* — Ed.

On the first of July, 1868, the wife of Henry Allen left him and his house, and she and the prisoner were shortly afterwards found on board a steamboat at Queenstown on its way from Liverpool to New York, passing as Mr. and Mrs. Prince, Mrs. Allen then having in her possession nearly all the remainder of the notes obtained from the bank. The note for £100, No. 72,799, was proved to have been paid away by the prisoner in payment for some sheep in May, 1868, and he said he had it from Mrs. Allen.

Upon this evidence it was objected by prisoner's counsel that the counts alleging the property to be in Henry Allen must fail, as the note had never been in his possession; and that as to the other counts the evidence did not show any larceny of the note from the bank by the wife, but rather an obtaining by forgery or false pretences by her, and that the receipt by the prisoner from her was not a receipt of stolen property. I held, however, that the forged order presented by the wife was under the circumstances a mere mode of committing a larceny against the London and Westminster Bank, and that the prisoner was liable to be convicted on the fourth count.

The jury found the prisoner guilty on that count and I respited judgment and reserved for the consideration of the court the question whether the obtaining the note from the bank by Mrs. Allen under the circumstances stated was a larceny by her; if not, the conviction must be reversed.[1]

Bovill, C. J. I am of opinion that this conviction cannot be sustained. The distinction between larceny and false pretences is material. In larceny the taking must be against the will of the owner. That is of the essence of the offence. The cases cited by Mr. Collins on behalf of the prisoner are clear and distinct upon this point, showing that the obtaining of property from its owner or his servant absolutely authorized to deal with it by false pretences will not amount to larceny. The cases cited on the other side are cases where the servant had only a limited authority from his master. Here, however, it seems to me that the bank clerk had a general authority to part with both the property in and possession of his master's money on receiving what he believed to be a genuine order, and that as he did so part with both the property in and possession of the note in question the offence committed by Mrs. Allen falls within the cases which make it a false pretence and not a larceny, and therefore the prisoner cannot be convicted of knowingly receiving a stolen note.

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[1] Arguments of counsel are omitted.

Channell, B. I am of the same opinion. The cases cited on one side and the other are distinguishable on the ground that in one class of cases the servant had a general authority to deal with his master's property, and in the other class merely a special or limited authority. If the bank clerk here had received a genuine order he would have paid the money for his master and parted with the property, and the transaction would have really been what it purported to be. If, however, the clerk makes a mistake as to the genuineness of a signature, nevertheless he has authority to decide that point; and if he pays money on a forged order the property therein passes from the master and cannot be said to have been stolen.

Byles, J. I am of the same opinion. I would merely say that I ground my judgment purely on authority.

Blackburn, J. I also am of the same opinion. I must say I cannot but lament that the law now stands as it does. The distinction drawn between larceny and false pretences — one being made a felony and the other a misdemeanor, and yet the same punishment attached to each — seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favor of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. However, as the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's and parts with his master's property, such property cannot be said to be stolen inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence so committed will be larceny. In Regina *v.* Longstreeth, 1 Moody, C. C. 137, the carrier's servant had no authority to part with the goods except to the right consignee. His authority was not generally to act in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case Regina *v.* Jackson, 1 Moody C. C. 119, which the same judges, or at any rate some of them, had shortly before decided. There the servant from whom the goods were obtained had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. So in the present case the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge; and if under a mistake he parts with money he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences. The distinction is inscrutable to my mind, but it exists in the cases. There is no statute enabling a count for larceny to be joined with one for false pretences; and as the prisoner was indicted for the felony the conviction must be quashed.

Lush, J. I also agree that the conviction must be quashed. I ground my judgment on the distinction between the cases which has been pointed out. The cashier is placed in the bank for the very purpose of parting with the money of the bank. He has a general authority to act for the bank, and therefore that which he does, his masters the bankers do themselves through him. *Conviction quashed.*[1]

REGINA *v.* BUCKMASTER.

Crown Case Reserved. 1887.

[*Reported* 16 *Cox C. C.* 339.]

This was a case stated for the opinion of the Court by the Chairman of the Court of Quarter Sessions for the County of Berks, which was as follows: —

1. At the General Quarter Sessions for the County of Berks, held on the 27th day of June, 1887, Walter Buckmaster was tried before me upon an indictment, omitting formal parts, which charged that he did on the 9th day of June, 1887, feloniously steal, take, and carry away certain money of the moneys of John Rymer.

2. It was proved that the prisoner and another man, at about 3 P. M. on the 9th day of June last, during the Ascot Race Meeting, were the only persons standing upon a platform or stand made to represent "safes," or iron safe chests. The words "Griffiths, the Safe Man," were printed upon it. The stand was outside the course, on a spot on Ascot Heath where carriages were placed, and was not within any betting inclosure or ring.

3. The prisoner, with a book in his hand, was calling out, "Two to one against the field," just before a race was about to be run. Rymer went up to him and asked, "What price Bird of Freedom?" to which he replied, "Seven to one to win." Rymer then deposited five shillings with Buckmaster, who told him that if the horse won he (Rymer) would win thirty-five shillings and get his own five shillings back. He also deposited another five shillings with Buckmaster, who told him that he would have fifteen shillings back, including his own five shillings. if the horse was first or second. The man who was with Buckmaster and was acting with him, received the money, and the latter, with whom all the conversation took place, appeared to take down the bet in his book, and gave Rymer a card-ticket with the words "Griffiths, Safe Man" upon it.

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[1] See People *v.* McDonald, 43 N. Y. 61. — Ed.

4. While the race was being run, the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning, the stand had gone. The horse Bird of Freedom won the race, and thereupon Rymer went back to the place where the stand had been, and he found that the prisoner and the other man had gone. He waited there for half an hour and then left. Much later in the afternoon Rymer saw the prisoner on another part of Ascot Heath and said, "I want £2 15*s*. from you." The prisoner said he knew nothing about it. Upon being told by Rymer that he would be detained, he admitted the bet and said he had not the money, but that he was only the clerk and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card-tickets with the words "Griffiths, the Safe Man" upon them. It was elicited from Rymer in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited.

5. At the close of the case for the prosecution, on behalf of the prisoner it was submitted that Rymer having parted voluntarily with the money there was no evidence of larceny nor of any taking by prisoner, and none of obtaining by false pretence or trick.

The learned chairman declined to withdraw the case from the jury, but assented to state this case. No evidence at all was called on the part of the prisoner, and a verdict of guilty was returned.

The question for the opinion of the court was whether there was any evidence to be left to the jury.

Keith-Frith, for the prisoner. In this case the prisoner might perhaps have been convicted of obtaining money by false pretences. But he has not been indicted for false pretences; and although upon an indictment for false pretences a prisoner can be convicted of larceny, he cannot upon an indictment for larceny be convicted of false pretences. There was no larceny here, because here there was no taking *invito domino*. [Lord COLERIDGE, C.J. — Why cannot it be larceny by a trick?] In larceny by trick, although the possession is parted with, the ownership does not pass. But here the prosecutor did intend to part with the ownership of the specific coins he gave the prisoner, and therefore the ownership in them passed. [HAWKINS, J. — No; the prosecutor merely intended to give the prisoner the coins as a deposit to abide the event of the race.] If that were so, then the person who makes a bet with a Geo. III. sovereign can insist upon that particular coin being returned to him if he wins. [SMITH, J. — Although the whole thing was a sham, do you say that the prosecutor intended to part with his coin?] No; but if the ownership was obtained by means of a trick as well as the possession, the prisoner ought to have been indicted for false pretences. Here the prosecutor said he would have been satisfied had he not got the same coins back; therefore he clearly intended that the property in the particular coins should pass. [HAWKINS, J. — Is not Rex *v*. Robson, Russ. & Ry. 413, an authority that the property did not pass under the circumstances?] No; for there the notes were never intended to be changed; they were merely deposited as a stake. Suppose here that Bird of Freedom had lost, the prisoner would have been entitled to keep the 5*s.* and could not have been indicted for stealing his own property; and therefore as the property passed, there could be no larceny, and the conviction should be quashed.

No counsel appeared on behalf of the prosecution.

Lord Coleridge, C. J. I am of opinion that in this case the conviction is right and should be affirmed. The only question left to us by the learned chairman is, whether there was any evidence that the prisoner had been guilty of larceny to be left to the jury. In my opinion there was abundant evidence from which the jury might infer that the prisoner was guilty. On behalf of the prisoner it has been argued that there is no doubt that the money was intended to be parted with, and that not only was the possession of the money parted with but the property in it was also intended to be parted with; and that therefore, as the property was intended to be parted with, there could be no larceny, but only the offence of obtaining money by false pretences; and that, although the prisoner, if he had been indicted for the false pretences, could have been convicted of larceny, the converse does not hold good, and he cannot, upon an indictment for larceny, be convicted of obtaining money by false pretences. To that there seems to me to be two answers: the first, that, supposing there was an intention on the part of the prosecutor to part with the property in the coin, in order to pass the property from him to the prisoner there must have been a contract under which it could pass; for a change of property could only have taken place by virtue of a contract of some sort, and a contract, by the very meaning of the word, must be the bringing together of two minds. Now, here there never was any bringing together of the minds of the prosecutor and the prisoner in the shape of a contract; for supposing the prosecutor to have intended to have parted with his money, he only intended to do so on the assumption that the prisoner intended to deal honestly with the money; whereas, on the contrary, the prisoner never intended to do that, but as the evidence shows clearly, intended to do that which the prosecutor never for a moment consented to. No contract ever existed therefore; and there is high authority that, under such circumstances, the property in the article does not pass. In Rex *v.* Oliver, Russ. on Crimes, vol. ii. p. 170, which was a case tried before Wood, B., the prosecutor there had a quantity of bank-notes, which he wanted to change, and the prisoner offered to change them for him. The prosecutor gave him the bank-notes, on which the prisoner decamped, and the prosecutor never got any money in return. It was argued that, as the prosecutor clearly intended to pass the property in the bank-notes to the prisoner, he could not be convicted of larceny. But Wood, B., held that the case clearly amounted to larceny if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold, and that whether the prisoner had at the time the *animus furandi* was the sole point upon which the question turned, for if the prisoner had at the time the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property in truth had never been parted with at all. The learned judge further said that "a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal." It appears to me that that is not only good sense but very sound law, and it is decisive of the point raised here. I am of opinion therefore that there is evidence of larceny here, and that the true view to take of this case is that the property did not pass. The second answer appears to me to be found in the case of Rex *v.* Robson, Russ. & Ry. 413, which is even more like this case than the case I have already cited. In Rex *v.* Robson the prosecutor was induced by the prisoner's confederates to make a bet with one of them and to part with a number of bank-notes to another of the confederates, who passed it on to the prisoner to hold as stake-holder. The prosecutor having apparently lost the bet, the money was given by the prisoner to the confederate with whom the bet was made, and he went away. Upon these facts it was held that, where there is a plan to cheat a man of his property under color of a bet, and he parts with the possession only to deposit the property as a stake with one of the confederates, the taking by such confederates is felonious. The case was tried by Bayley, J., who told the jury that if they thought, when the notes were received, there was a plan and concert between the prisoners that the prosecutor should never have them back, but that they should keep them for themselves, under the false color and pretence that the bet had been won, he was of opinion that in point of law it was a felonious taking by all. The jury convicted, but the learned judge thought proper, as the case came very near Rex *v.* Nicholson, 2 East P. C. 669, to submit it to the consideration of the judges, making the distinction between the cases that in Rex *v.* Robson, at the time the prisoners took the prosecutor's notes, he parted with the possession only and not the property; and that the property was only to pass eventually, if the confederate really won the wager; and that the prosecutor expected to have been paid had the confederate guessed wrongly. Ten of the judges considered the case and held the conviction right, because at the time of the taking the prosecutor parted only with the possession of the money. Now, the true view of the case here is exactly like the view which the judges took in that case. In this case the prosecutor deposits money with the prisoner, never intending to part with that money, but being told that in a certain event he was to have that money and something more added to it given back to him. The prisoner, on the other hand, took the money, never intending to give it back, and decamped with it. It appears to me, therefore, that the possession only of the money was parted with, and that the prosecutor never intended to part with the property in it. No doubt had he had money given back to him, he would not have inquired into the question whether his own 5*s*. came back to him or not. But that does not affect the question whether, when he placed the coins in the prisoner's hands, he intended to pass the property in them to the prisoner. At all events there was plenty of evidence from which the jury could find that such was not his intention; and in my opinion the conviction should be affirmed.

Pollock, B. I have nothing to add.

Manisty, J. I have very few words to say. I take it on the authorities cited by my Lord that it is settled law that if a man parts with the possession of money but does not intend to part with the property in it, and the person receiving the money intends at that time to steal the money in a certain event, that there then is larceny. That is the ground on which I think that, as in this case the prosecutor never intended to part with his 5*s*. except in the event which did not occur and the prisoner never intended to return the money, the prisoner was guilty of larceny.

Hawkins, J. The only question for our determination is, whether there was any evidence to go to the jury. I am of opinion that there was abundant evidence. I think the evidence pointed to this, that the whole of the prisoner's conduct pointed to an original and preconcerted plan of the prisoner to obtain possession of and keep the money of the prosecutor; and that the prosecutor never intended on such terms to part with the property in his 5*s*. I think therefore that there was abundant evidence of larceny in this case, and that the conviction should be affirmed.

Smith, J. I think that it is clear the prosecutor never intended to part with the property in the 5*s*. except on condition that a *bona fide* bet was made. I think also that there is evidence that at the time the prosecutor handed the 5*s*. to the prisoner, the prisoner intended to keep possession of the money, whether Bird of Freedom lost or won. He therefore obtained the possession of the prosecutor's money by means of a preconcerted and premeditated fraud; in other words, by a trick. There was therefore abundant evidence of larceny, and in my opinion the conviction should be affirmed.[1] *Conviction affirmed.*

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[1] Stinson *v.* People, 43 Ill. 397; Grunson *v.* State, 89 Ind. 533; Miller *v.* Com., 78 Ky. 15; People *v.* Shaw, 57 Mich. 403; Loomis *v.* People, 67 N. Y. 322. But see Rex *v.* Nicholson, Leach (4th ed.), 610; Reg. *v.* Riley, 1 Cox C. C. 98. — Ed.

REGINA *v.* SOLOMONS.

CROWN CASE RESERVED. 1890.

[*Reported* 17 *Cox C. C.* 93.]

CASE stated by the Deputy-chairman of the London County Quarter Sessions, as follows: —

The above prisoner was tried before me on the 20th day of February, 1890, upon an indictment which charged that he "did on the 2d day of February, 1890, feloniously steal, take, and carry away three shillings and sixpence, the property of Edward Davy." The second count charged him "with feloniously receiving the same, well knowing it was stolen."

The prosecutor Edward Davy deposed as follows: —

That on the 2d day of February in this year I was near Aldgate, when the prisoner came up to me. At that time there was another man standing a little way off selling purses. The prisoner said, "I'll show you how the trick is done." He then opened a purse which he had in his hand, and putting three shillings in his other hand said, "You see there are three shillings there." I said, "Yes." He then dropped them, or appeared to do so, into the purse. He then asked me if I would give him one shilling for the three shillings and the purse. I hesitated, but afterwards gave him a shilling for the three shillings and the purse, and put the purse into my pocket. He then pulled out another purse, and showing two half-crowns in his hand, put them, or appeared to put them, into the purse, and asked me if I would give him half a crown for the two half-crowns and the purse. I gave him half a crown. The prisoner then said, "Just to show that I am not cheating, and to let the public see it, you had better give me one-and-sixpence for myself," which I did. I then walked a little distance away and opened the first purse which he had said contained three shillings, and found only three halfpence. In the second purse, which was said to contain two half-crowns, I found two penny pieces only.

In cross-examination the prosecutor stated that the prisoner promised him three shillings for one shilling, that he bought the three shillings and the purse, that he did not buy on speculation, and that he was willing to take the half-crown, if the prisoner was willing to part with it; that he never said that he parted with his money to see how the trick was done, and that at the time he was on his way to the Tabernacle to hear Mr. Spurgeon.

Another witness, named Norfolk, in every particular corroborated the story, but his evidence will be unnecessary to give in detail.

A constable named Burnett was also called, and stated that he took the prisoner into custody for stealing three shillings and sixpence. Prisoner in reply said, "Serve him right; more fool he to buy them." On being searched there were found on prisoner seven purses and eleven shillings in silver. The prosecutor on being recalled stated that he did not care for the purses, but that he wanted the money which the prisoner promised.

Upon this state of facts it was argued by counsel for the prisoner that the prisoner ought not to have been indicted for larceny, because the prosecutor voluntarily parted with his money, both the possession and the ownership, in return for the money which he hoped to get. Cases were quoted in support of this statement.

I overruled the objection, and pointed out that in my opinion there was no difference between the present state of facts and the crime of larceny as committed in the case of "ring dropping," and that although the indictment might have been framed for obtaining money by false pretences, the present one was equally good to maintain the crime of larceny by a trick.

The verdict was as follows: "We find the prisoner guilty of 'obtaining' the money by a trick." I asked the jury what they meant; did they mean that the prisoner committed the crime of larceny by a trick as explained by me? and they answered in the affirmative.

I, considering it of importance to have it determined whether this form of crime came within the misdemeanor of obtaining goods by false pretences, or whether it was a felony, decided to state this case, which I respectfully do, for the consideration of the Court of Criminal Appeal.

The question for the opinion of the court is, whether I was right in holding and directing the jury that the prisoner might be convicted of larceny by trick.

Keith Frith, on behalf of the prisoner. There was no larceny or trick here, for wherever the ownership as well as the possession of goods is parted with, there can be no larceny. The prisoner should have been indicted for obtaining the coins by false pretences. Where it has been held that there has been larceny by a trick, such as the confidence trick, the possession and not the ownership has been parted with. [LORD COLERIDGE, C.J. — In Reg. *v.* Robson (R. & R. 413) money was deposited for a pretended bet, and it was held to have been a case of larceny.] That was because there the money was only deposited, and though the possession was parted with the ownership of the money did not pass. In Reg. *v.* Wilson (8 C. & P. 111), the ring-dropping case, it was held to be a case of false pretences. [The court here adjourned, and upon re-assembling on the 17th day of May, called upon the counsel for the prosecution to support the conviction.]

May 17th. Slade Butler for the prosecution. The question here is, whether or not this particular trick comes within the definition of larceny. It is said that it does not, because the prosecutor intended to part with the ownership of the coins. But the intention in the mind of the prosecutor cannot alter the nature of the crime. The question is really what was the intention of the prisoner when he took the coins; and there can be no doubt but that he intended to obtain them wrongfully. The point is concluded by the case of Reg. *v.* Middleton (28 L. T. Rep. N. S. 777; 12 Cox C. C. 417; L. Rep. 2 C. C. R. 38; 42 L. J. 73,

M. C.). There must be a genuine contract in order to pass the property, and here there was never any contract. The prosecutor here never intended to contract for what he obtained. He also cited Reg. *v.* Buckmaster (57 L. T. Rep. N. S. 720; 16 Cox C. C. 339.; 20 Q. B. Div. 182; 57 L. J. 25, M. C.).

Lord Coleridge, C.J. This case is really upon consideration too clear for me to entertain any doubt about it. Of course one hesitates to let off a man if he is guilty of a gross fraud, and it is matter for regret to have to let off a man who is really guilty of something. But as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law, and by the law of England, though it is enacted by 24 & 25 Vict. c. 96, s. 88, that a man indicted for false pretences shall not be acquitted if it be proved that he obtained the property with stealing which he is charged in any such manner as to amount in law to larceny, unfortunately the statute stops there, and does not go on to say that if upon an indictment for larceny the offence committed is shown to be that of false pretences, the prisoner may be found guilty of the latter offence. The statute not having said it, and the one offence being a misdemeanor while the other is a felony, you cannot according to the ordinary principles of the common law convict for the misdemeanor where the prisoner is indicted for the felony. Now the law is plain that, where the property in an article is intended to be parted with, the offence cannot be that of larceny. Here it is quite clear that the prosecutor did intend to part with the property in the piece of coin, and the case is not like any of those cases in which the prosecutor clearly never intended to part with the property in the article alleged to have been stolen. Whether or not the prosecutor here intended to part with the property in the coin does not signify if what he did was in effect to part with it for something which he did not get. I have already said that you cannot convict of false pretences upon an indictment for larceny, and as the offence here was, if anything, that of false pretences, and the indictment was for larceny, it follows that this man must get off upon this indictment. I am therefore of opinion that this conviction must be quashed.

Hawkins, J. I cannot myself imagine a clearer illustration of the difference between the offence of false pretences and that of larceny than is afforded by this case. It is perfectly clear that the prosecutor intended to part with the property in the coins, and that being so, the case is clearly not that of larceny. The conviction must therefore be quashed.

Mathew, J. This is a case of false pretences, if anything, and not of larceny; and I am of opinion therefore that the conviction must be quashed.

Day, J. I entirely concur with my Lord.

Grantham, J. I am of the same opinion.

Conviction quashed.[1]

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[1] *Acc.* Reg. *v* Williams, 7 Cox C. C. 355; Reg. *v* McKale, 11 Cox C. C. 32; Reg. *v.* Twist, 12 Cox C. C. 509; Reg. *v.* Hollis, 15 Cox C. C. 32. — Ed.

REGINA *v.* RUSSETT.

CROWN CASE RESERVED. 1892.

[*Reported* [1892] 2 *Q. B.* 312.]

CASE stated by the Deputy-chairman of the Gloucestershire Quarter Sessions: —

The prisoner was tried and convicted upon an indictment, charging him with having feloniously stolen on March 26, 1892, the sum of £8 in money of the moneys of James Brotherton. It appeared from the facts proved in evidence that on the day in question the prosecutor attended Winchcomb fair, where he met the prisoner, who offered to sell him a horse for £24; he subsequently agreed to purchase the horse for £23, £8 of which was to be paid down, and the remaining £15 was to be handed over to the prisoner either as soon as the prosecutor was able to obtain the loan of it from some friend in the fair (which he expected to be able to do) or at the prosecutor's house at Little Hampton, where the prisoner was told to take the horse if the balance of £15 could not be obtained in the fair. The prosecutor, his son, the prisoner, and one or two of his companions, then went into a public house where an agreement in the following words was written out by one of the prisoner's companions, and signed by prisoner and prosecutor: "26th March, G. Russett sell to Mr. James and Brother [*sic*] brown horse for the sum of £23 0*s.* 0*d.* Mr. James and Brother pay the sum of £8, leaving balance due £15 0*s.* 0*d.* to be paid on delivery." The signatures were written over an ordinary penny stamp. The prosecutor thereupon paid the prisoner £8. The prosecutor said in the course of his evidence: "I never expected to see the £8 back, but to have the horse." The prisoner never gave the prosecutor an opportunity of attempting to borrow the £15, nor did he ever take or send the horse to the prosecutor's house; but he caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it.

It was objected on behalf of the prisoner that there was no evidence to go to the jury, on the ground that the prosecutor parted absolutely with the £8, not only with the possession but with the property in it; and, consequently, that the taking by the prisoner was not larceny, but obtaining money by false pretences, if it was a crime at all; the objection was overruled. In summing up, the Deputy-chairman directed the jury that if they were satisfied from the facts that the prisoner had never intended to deliver the horse, but had gone through the form of a bargain as a device by which to obtain the prosecutor's money, and that the prosecutor never would have parted with his £8 had he known what was in the prisoner's mind, they should find the prisoner guilty of larceny.

The question for the court was whether the Deputy-chairman was right in leaving the case to the jury.

Gwynne James, for the prisoner. The conviction was wrong. The only offence disclosed was that of obtaining money by false pretences. There was no evidence to go to the jury upon a charge of larceny. The property in the money passed to the prisoner at the time when it was handed to him by the prosecutor, who admittedly never expected to see it again; the receipt given for the money is strong evidence of the change of property. The case is distinguishable from Reg. *v.* Buckmaster, 20 Q. B. D. 182; for in that case the question was whether the prosecutor expected to have his money back. There is in the present case a breach of contract, for which the prosecutor has a civil remedy, and it is immaterial that the prisoner in making the contract had a fraudulent intent. Rex *v.* Harvey, 1 Leach, 467. For the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing. Clough *v.* London and North Western Ry. Co., Law Rep. 7 Ex. at p. 34. The principle of law is stated in Roscoe's Criminal Evidence, 11th ed. at p. 620, where it is said: "The doctrine is clearly established that, if the owner intends to part with the property in the goods, and in pursuance of such intention delivers the goods to the prisoner, who takes them away, and the property becomes his, this is not larceny, even though the prisoner has from the first a fraudulent intention."

Stroud, for the prosecution, was not called upon.

Lord Coleridge, C. J. I am of opinion that this conviction must be supported. The principle which underlies the distinction between larceny and false pretences has been laid down over and over again, and it is useless for us to cite cases where the facts are not precisely similar when the principle is always the same. When the question is approached it will be found that all the cases, with the possible exception of Rex *v.* Harvey, 1 Leach, 467, as to which there may be some slight doubt, are not only consistent with, but are illustrations of, the principle, which is shortly this: if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud — that is larceny. This seems to me not only good law, but good sense, and this principle underlies all the cases. If, however, authority be wanted, it is to be found in two cases which we could not overrule without the very strongest reason for so doing: the first is Reg *v.* McKale, Law Rep. 1 C. C. 125, where Kelly, L.C.B., said, "The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud, the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny." The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority. The other case is that of Reg. *v.* Buckmaster, 20 Q. B. D. 182, which seems to me directly in point; that decision was grounded on Rex *v.* Oliver, 2 Russell on Crimes, 170, and Rex *v.* Robson, Russ. & Ry. 413, where the same principle was applied, and the same conclusion arrived at.

Pollock, B. I agree in the conclusion at which the court has arrived, and would add nothing to the judgment of my Lord but that I wish it to be understood that this case is decided on a ground which does not interfere with the rule of law which has been so long acted on: that where the prosecutor has intentionally parted with the property in his money or goods as well as with their possession there can be no larceny. My mind has therefore been directed to the facts of the case, in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion, he certainly did not. This was not a case of a payment made on an honest contract for the sale of goods, which eventually may, from some cause, not be delivered, or a contract for sale of a chattel such as in Rex *v.* Harvey, I Leach, 467; from the first the prisoner had the studied intention of defrauding the prosecutor; he put forward the horse and the contract, and the prosecutor, believing in his *bona fides*, paid him £8, intending to complete the purchase and settle up that night. The prisoner never intended to part with the horse, and there was no contract between the parties. The money paid by the prosecutor was no more than a payment on account.

Hawkins, J. I am entirely of the same opinion. In my judgment the money was merely handed to the prisoner by way of deposit, to remain in his hands until completion of the transaction by delivery of the horse. He never intended, or could have intended, that the prisoner should take the money and hold it, whether he delivered the horse or not. The idea is absurd; his intention was that it should be held temporarily by the prisoner until the contract was completed, while the prisoner knew well that the contract never would be completed, by delivery; the latter therefore intended to keep and steal the money. Altogether, apart from the cases and from the principle which has been so frequently enunciated, I should not have a shadow of doubt that the conviction was right.

A. L. Smith, J. The question is whether the prisoner has been guilty of the offence of larceny by a trick or that of obtaining money by false pretences; it has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence; but I cannot agree with that contention. The difference between the two offences is this: if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick; the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner. This case, therefore, comes to be one of fact, and we have to see whether there is evidence that, at the time the £8 was handed over, the prosecutor intended to pass to the prisoner the property in that sum, as well as to give possession. I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to shew how impossible it is to read into it an agreement to pay the £8 to the prisoner whether he gave delivery of the horse or not; it was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession.

WILLS, J. I am of the same opinion. As far as the prisoner is concerned, it is out of the question that he intended to enter into a binding contract; the transaction was a mere sham on his part. The case is not one to which the doctrine of false pretences will apply, and I agree with the other members of the court that the conviction must be affirmed. *Conviction affirmed.*[1]

REX *v.* TIDESWELL.

COURT FOR CROWN CASES RESERVED. 1905.

[*Reported* 1905, 2 *K. B.* 273.]

CASE stated by the chairman of the Staffordshire Quarter Sessions for the consideration of the Court for Crown Cases Reserved.

1. The prisoner was tried on an indictment charging him —

(*a*) With feloniously stealing 1 ton 10 cwt. of casters' ashes on January 28, 1904, the property of Allen Everitt & Sons, Limited.

(*b*) With receiving the said goods on the date aforesaid well knowing them to have been stolen.

(*c*) With feloniously stealing 1 ton 6 cwt. of casters' ashes on April 21, 1904, the property of the said Allen Everitt & Sons, Limited.

(*d*) With receiving the last-mentioned goods on the said date well knowing them to have been stolen.

2. It was proved that the prisoner had been a customer of Allen Everitt & Sons, Limited, for a number of years, purchasing waste and residual metal products from them. A man named Ephraim Kaye was employed by Allen Everitt & Sons, Limited, as general metal weigher, and it was his duty to weigh out waste and residuals, and to enter in a book, called the residual metal book, a record of such weights for the purpose of enabling the customers to be charged in the books of the company with the proper weights. It was also the duty of Ephraim Kaye to keep another book, called the receipt book, in which he took

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[1] *Acc.* People *v.* Rae, 66 Cal. 423. See People *v.* Raschke, 73 Cal. 378. — ED.

from the customers signed receipts for the weights of waste and residuals taken by them.

3. On January 23, 1904, Ephraim Kaye weighed and delivered into trucks of the railway company a quantity of casters' ashes, a residual metal product, the property of Allen Everitt & Sons, Limited, weighing in fact 32 tons 13 cwt. Ephraim Kaye made out a receipt for these casters' ashes by the prisoner in his receipt-book, describing them as weighing 31 tons 3 cwt. only, and this receipt was, on January 23, signed by the prisoner, who was charged with that amount only in the books of the company. On January 20 and 23 the prisoner made out two consignment notes to the railway company in his own handwriting for 19 tons 9 cwt. and 13 tons 4 cwt. respectively of casters' ashes, amounting together to 32 tons 13 cwt.

4. On April 21, 1904, Ephraim Kaye weighed and delivered into two trucks of the railway company a quantity of casters' ashes, the property of Allen Everitt & Sons, Limited, weighing in fact 12 tons 16 cwt. 2 qrs. The prisoner on April 20 signed a receipt made out by Ephraim Kaye in his receipt-book for 11 tons 10 cwt. 2 qrs. only, and was charged with that weight in the books of the company. The prisoner on April 21 made out a consignment note to the railway company in his own handwriting for 12 tons 16 cwt. 2 qrs. of casters' ashes.

5. Ephraim Kaye, who, on being charged with the aforementioned felonies before magistrates at petty sessions, pleaded guilty, and was sentenced to three months' imprisonment, was called on behalf of the prosecution, and stated that he entered the lesser weights in the residual metal book and receipt-book intentionally, and that he kept a private book, to which he referred at the trial, in which he entered all the correct weights of goods weighed out to the prisoner, who obtained these correct weights from him, or through being present at the time they were entered. He said that he had no previous arrangement or understanding with the prisoner that he was to be charged for less casters' ashes than were to be sent, and that he could not say that he had ever told the prisoner that he was being charged for less than the actual weights on any occasion, and that there was no understanding as to any particular deduction from weights, though (he added) deductions were as a matter of fact made; but the prisoner had given him sums of money from time to time as a reward for these services generally, though not as a payment in respect of any particular transaction. All the casters' ashes that were put into the railway company's trucks were loaded in the ordinary course of business between Allen Everitt & Sons, Limited, and the prisoner.

6. On this evidence it was objected by counsel for the prisoner that the indictment was not supported by the evidence, on the ground that there was no proof of the larceny or receiving by the prisoner of any specific goods.

7. I overruled the objection, but consented to reserve the point for the consideration of the Court for Crown Cases Reserved. I told the

jury that if they believed the evidence for the prosecution, their duty was to find the prisoner guilty. The jury found the prisoner guilty.

March 18. *Vachell,* for the prisoner. The ashes put into the trucks were never divided, so that it was impossible to say which particular tons or hundredweight were stolen. "In larceny some particular article must be proved to have been stolen;" per Alderson, B., Reg. *v.* Lloyd Jones (1838), 8 C. & P. 288. Secondly, the evidence shews that the property in the whole of the ashes weighed out by Kaye passed from the prosecutors. Sale of Goods Act, 1893, § 18, rule 3.

R. W. Coventry, for the prosecution. It is enough to specify the amount stolen, although it forms part of a larger bulk. Kaye had no authority from the prosecutors to transfer the property in any portion of the ashes except to the extent of the entry made by him in the residual metal book. And the prisoner, knowing that he had no such authority, got no property in the excess. Reg. *v.* Hornby (1844), 1 C. & K. 305.

The Court ordered the case to be remitted to the quarter sessions with directions that the following questions should be answered: —

(*a*) Was there any previous or contemporary contract between the prisoner and Allen Everitt & Sons, Limited, or any authorized agent or servant of Allen Everitt & Sons, Limited, other than Kaye, either for the sale of these ashes or the sale of any quantities of ashes? If so, the particulars of the terms of the contract should be set out.

(*b*) Was there any contract between the prisoner and Kaye for the sale of the ashes on either of the dates laid in the indictment? If so, the particulars of the contract should be set out.

In accordance with that order the chairman stated as follows: —

The evidence at the trial did not disclose any such contract as referred to in paragraph (*a*) or in paragraph (*b*). The managing director of the prosecutors stated in evidence that the prisoner was a customer as buyer of residuals, and that he had sold as much as 3000*l.* in value to the prisoner, and that he had known the prisoner fifteen years in the way of business. The practice appears to have been that when Allen Everitt & Sons, Limited, had an accumulation of waste residuals or ashes they sent for the prisoner, who saw the managing director and arranged verbally with him to buy so much as he should require of the bulk at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing. The ashes, the subject of the indictment, formed part of one of these accumulations.

May 20. *R. W. Coventry,* for the prosecution.

Vachell, for the prisoner. The property in the whole of the truckloads passed to the prisoner as soon as they were separated from the bulk and weighed and put into the trucks for the prisoner. For nothing else remained to be done to pass the property. Whatever fraud was afterwards perpetrated could not alter the fact. The prosecutors intended the whole of the goods to go to the prisoner, for, by the terms of the arrangement, he was to take as much as he pleased. What the prosecutors were deprived of was not a certain quantity of goods, but a part of the price.

Lord Alverstone, C. J. Upon the point reserved for our consideration upon the case as originally stated, namely, whether the indictment for larceny could be supported in the absence of proof of larceny of any specific portion of the goods, I entertained no doubt whatever. But in the course of the argument a question was raised as to whether the property in the goods had not already passed to the prisoner at the time of the fraudulent entry in the weight-book, and whether consequently, whatever other criminal offence he might have committed, he could be properly charged with larceny; and as we thought the case did not sufficiently state the facts with respect to that matter, we sent it back to be restated. The question whether the prisoner's offence amounts to larceny must depend upon the circumstances under which he received the goods. Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock, and subsequently the purchaser were to fraudulently arrange with the bailiff that whereas there were in fact thirty sheep they should be counted as twenty-five, and the purchaser should be charged with twenty-five only, there would be no larceny, because the property would have passed to the purchaser before the fraudulent agreement was entered into. On the other hand, if the owner were to leave it to his bailiff to arrange the sale, authorizing him to sell as many sheep out of the flock as the purchaser should be willing to buy, then if the contract of sale arranged between the bailiff and the purchaser was expressed to be for twenty-five sheep, and the whole thirty were fraudulently delivered to the purchaser, the obtaining possession of the five sheep as to which there was no contract of sale would amount to larceny. In the present case, as restated, it appears that there was no contract with the managing director that the prisoner should buy the whole of the ashes in the trucks, but only such a quantity as should be defined by the weighing; in other words, there was no contract of purchase except that made with Kaye. That being so, the case is governed by the principle of Reg. *v.* Hornby, 1 C. & K. 305, where the prisoner received goods from the servant of the owner under color of a pretended sale, and it was held that the fact of his having received the goods with the knowledge that the servant had no authority to sell, and was in fact defrauding his master, was sufficient to support an indictment for larceny. I am of opinion that the conviction in this case must be upheld.

Lawrance, J. I am of the same opinion.

Kennedy, J. I agree in the statement of the law by my Lord, and I also think that upon the case as originally stated it was not clear that the facts shewed the prisoner to have been guilty of larceny within that statement. It was contended that what took place was an arrangement whereby the property passed to the prisoner. If there had been a completed contract with the managing director, or some other official of the company covering all the goods in the trucks, then no doubt the property would have passed, and no subsequent fraud would make the receipt of the goods larceny. The offence in such a case would be only a conspiracy to defraud the sellers of part of the price. But here, on the facts as now stated, there was no intention by the prosecutors to pass the property except in such goods as should be ascertained by the weighing, — that is to say, in the smaller quantity. Conseqently there was a larceny of the balance.

Channell, J. I agree. It appears to me that the question whether the prisoner could properly be convicted of larceny depends upon whether there was a contract between Allen Everitt & Sons, Limited, and the prisoner for the sale of the casters' ashes other than a contract made through the agency of the fraudulent man Kaye. To take the illustration given during the argument of the sale of sheep. If a farmer sells all the sheep in a field to a purchaser at so much per head, but not knowing for certain how many sheep there are, sends his servant with the purchaser to count them, and the servant and the purchaser fraudulently agree to say that there were only nineteen sheep when there really were twenty, there is no larceny because all the sheep have been sold by their owner to the purchaser, but the purchaser and the servant have conspired to defraud the owner of the price of one sheep. If, however, a farm bailiff, having authority to sell his master's sheep in the ordinary way, says to a purchaser, "There are twenty sheep in the field belonging to my master, but he does not know how many there are; you can take them all. I will tell my master you had nineteen only, and you can pay him for nineteen and give me a present for myself." there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty sheep, or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser, and no property passes in the twentieth sheep by the act so known to be fraudulent, even if the bailiff professes to part with the property in it. Reg. *v.* Hornby, 1 C. & K. 305, is a distinct authority for this. It is a decision of Coltman, J., alone, but it appears to be good law. Reg. *v.* Middleton (1873), L. R. 2 C. C. 38, also supports this view, and so do all the cases as to what is usually called larceny by a trick. In the case supposed it would be impossible to say which of the twenty sheep was the one which had been stolen, but it could not be said that that would prevent a conviction. The suggested difficulty in the present case of identifying the ton and a half of casters' ashes which was stolen is, in my opinion, no more fatal than the difficulty as to the sheep would be. In the present case the jury must be taken to have found that the prisoner was a party to the fraud, and though he may not have known what quantity was on any particular occasion to be given to him without paying for it, or even that on a particular parcel being handed to him some part would be so given to him (for Kaye doubtless would only commit the fraud when the circumstances presented a reasonable probability of its being done without detection), yet the prisoner must be taken to have known before the transactions the subjects of this indictment that Kaye would probably do on this occasion what he had clearly done on others, and in the cases when he did so there would be a larceny committed by both, though in the other cases, when the stuff was correctly weighed, there would be none. On these points I find no difficulty, but in the case as originally stated there was nothing to shew whether the whole transaction of the sale of the casters' ashes was carried through by Kaye, or whether the limited company by any other officer or agent made a contract for the sale.

PHILLIMORE, J. I entirely agree. *Conviction affirmed.*

SECTION VI.

Animus furandi.

REX v. WILKINSON.

CROWN CASE RESERVED. 1821.

[*Reported Russell & Ryan*, 470.]

THE prisoners were tried before Mr. Justice Park (present Lord Chief Justice Abbott) at the Old Bailey Sessions, October, 1821, on an indictment for stealing six thousand six hundred and ninety-six pounds' weight of nux vomica, value thirty pounds, the property of James Marsh, Henry Coombe, and John Young, in a certain boat belonging to them in the port of London, being a port of entry and discharge.

It appeared in evidence that the prosecutors were lightermen and agents, and were employed by a Mr. Cooper, a merchant, who delivered them warrants properly filled up to enable them to pass the nux vomica through the custom house for exportation to Amsterdam. The quantity was thirty bales of nux vomica, consisting of seven hundred and fifty bags.

For exportation this commodity paid no duty; but for home consumption there was a duty of two shillings and sixpence on the pound weight, though the article itself was not worth above one penny per pound.

Messrs. Marsh & Co. entered the bales for a vessel about to sail to Amsterdam, called the "York Merchant," then lying in the London dock; and having done what was necessary delivered back the cocket bill and warrants to Cooper, considering him as the owner, and Marsh & Co. gave a bond to Government with Cooper under a penalty to export these goods. Marsh & Co. were to be paid for lighterage and for their services.

After this Marsh & Co. employed the prisoner Wilkinson as their servant, who was a lighterman (and who had originally introduced Cooper to them to do what was necessary respecting the nux vomica), to convey the goods from Bon Creek, where they were, to the "York Merchant" at the London docks, and lent their boat with the name "Marsh & Co." upon it to enable him so to do.

The prisoner Wilkinson accordingly went and got the nux vomica by an order commanding the person who had the possession of it to deliver it to Mr. John Cooper. The bales were marked C. 4 to 33.

When Wilkinson received the cargo, instead of taking it to the "York Merchant" he, one William Marsden, and the other prisoner, Joseph Marsden, took the boat to a Mr. Brown's, a wharfinger at Lea Cut in the county of Middlesex, and there unloaded it into a warehouse which William Marsden had hired three weeks before, and which they had used once before. The two prisoners and William Marsden were there employed a long time in unpacking the bales, taking out the nux vomica, repacking it in smaller sacks, and sending it by a wagon to London, and refilling the marked bales with cinders and other rubbish which they found on the wharf.

The prisoner Wilkinson then put the bales of cinders, etc., on board the boat, took them to the "York Merchant," hailed the vessel, and said he had thirty bales of nux vomica, which were put on board and remained so for two or three days when the searcher of the customs discovered the fraud.

Marsh & Co. admitted that they had not been called on for any duties nor sued upon the bond, though the bond remained uncancelled.

The defence was, and which Cooper was called to prove, that the goods were not his (Cooper's), but that he had at William Marsden's desire lent his name to pass the entry; and that he had done so, but did not know why; that he did not know it was a smuggling transaction, or that the object was to cheat Government of the importation duties.

If these were to be considered as the goods of Cooper then it should seem a felony was committed upon them by Wilkinson and the two Marsdens by taking them in the manner described out of the hands of Marsh & Co. without their knowledge or consent, who as lightermen or carriers had a special property in them, and who were also liable to Government to see the due exportation of them.

Even if they were the goods of William Marsden, who superintended the shifting of them from the bales to the sacks, the question for the judges to consider was whether this can be done by an owner against a special bailee who has made himself responsible that a given thing shall be done with the goods, and which the owner, without the knowledge or consent of such bailee, had by a previous act entirely prevented.

The learned judge told the jury that he would reserve this point for the opinion of the judges; but desired them to say whether they thought the general property in the goods was in Cooper or William Marsden.

The jury found the prisoners guilty, and that the property was William Marsden's.

In Michaelmas Term, 1821, eleven of the judges (BEST, J., being absent) met and considered this case. Four of the judges, namely, RICHARDSON, J., BURROUGH, J., WOOD, B., GRAHAM, B., doubted whether this was larceny because there was no intent to cheat Marsh & Co. or to charge them, but the intent was to cheat the Crown. Seven of the judges, namely, GARROW, B., HOLROYD, J., PARK, J., BAYLEY, J.. RICHARDS, C. B., DALLAS, C. J., ABBOTT, L. C. J., held it a larceny because Marsh & Co. had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of part of the seven judges this would have been larceny although there had been no felonious intent against Marsh & Co., but only an intention to defraud the Crown.[1]

REGINA v. WEBSTER.

CROWN CASE RESERVED. 1861.

[*Reported* 9 *Cox C. C.* 13.]

CASE reserved for the opinion of this court by the Chairman of the West Riding Sessions, held at Sheffield.

William Webster was indicted at the West Riding of Yorkshire Spring intermediate sessions, held at Sheffield, on the 22d May, 1861, for stealing, on the 11th of May, at Ecclesfield, three sovereigns and one half-sovereign, the property of Samuel Fox and others.

It was proved on the trial that James Holt was in possession of a shop, where goods were sold for the benefit of a society called the "Stockbridge Band of Hope Co-operative Industrial Society."

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[1] *Vide* Fost. 124. — REP.

Each member of the society partook of the profit, and was subject to the loss arising from the shop. Holt (being himself a member) had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop without salary.

On the occasion of the alleged larceny Holt had marked some sovereigns and half-sovereigns, and placed them in the till. The prisoner was suspected of taking some of them, and when charged with this he admitted that he had taken the coins which formed the subject of this charge, and produced them from his pocket.

The prosecution failing to prove that this was a friendly society duly enrolled, elected to amend the indictment by substituting the name of James Holt for that of Samuel Fox and others, and the same was amended accordingly.

The counsel for the prisoner put in a copy of the rules of the society, with the name of John Tidd Pratt printed at the end thereof, and proved that this copy had been examined with the original copy, signed and sealed by the registrar of friendly societies, but which was not produced. He also put in a conveyance of the shop and premises to Samuel Fox and other as trustees.

No other evidence of the trusteeship was given.

The counsel for the prosecution objected that in order to prove the society to be a friendly society under the 18 & 19 Vict. c. 63, it was necessary to produce the original copy signed by the registrar, or to account for its absence sufficiently to justify the admission of secondary evidence.

I overruled this objection, and admitted this evidence as proof that the society was duly enrolled.

It was contended for the prisoner that Fox and others were the trustees; that this was a friendly society, and that the property should be laid in Fox and others, and not in Holt, and that the prisoner could not therefore be convicted on the indictment as amended; that as to any special property Holt might have in the money taken, he was joint owner of it with the prisoner, and as partner with him was equally in possession of it, and could not therefore be convicted.

The court overruled these last mentioned objections, and the prisoner was convicted and sentenced to be imprisoned in the house of correction at Wakefield for nine calendar months, subject to the opinion of the Court of Criminal Appeal whether under the circumstances the conviction was right.

The prisoner was admitted to bail to await the decision of the Court of Criminal Appeal.

A copy of the rules of the society accompanies this case, and is to be taken as incorporated therewith.

WILSON OVEREND, Chairman.

T. Campbell Foster, for the prisoner. It is contended that the indictment as amended was not proved, and that the property ought to have been laid as in Fox and others, the trustees of the friendly society. The prosecutor having failed to prove that the property was rightly laid in Fox and others, and the court having amended the indictment by substituting Holt's name instead of Fox and others, the prisoner produced the proper evidence to show that Fox and others were the trustees of the society, and then objected to the indictment as amended, on the ground that by the 18 & 19 Vict., c. 63, s. 18, the property of the friendly society was vested in the trustees. Sect. 19 empowers the trustees to bring or defend, or cause to be brought or defended any action, suit or prosecution in any court of law or equity, touching or concerning the property, right or claim to property of the society, "and such trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded in their proper names as trustees of such society without other description."

MARTIN, B. What evidence was there to show that Holt was not in possession of these sovereigns as of his own lawful property?

WIGHTMAN, J. Again, he was a partner, and had the personal possession of these moneys.

T. Campbell Foster. It is submitted that the only possession Holt had was that of a servant to the friendly society. If he had taken and appropriated any of the moneys received by him, he might have been indicted for embezzlement, and therefore he was a servant, and his possession was that of the society his masters.

WIGHTMAN, J. He was not a servant; he was an owner, and had the sovereigns in his personal possession.

MARTIN, B. He had the sole management of the shop, and was answerable for the safety of all the property and money coming to his possession in the course of such management.

T. Campbell Foster. Then the prisoner, being also a member of the the society, was a partner, and could not be convicted of stealing his own property.

WILLIAMS, J. There is the well-known case of a man, when the hundred was liable, being convicted of stealing his own money from his own servant. Foster, 123, 124.

WIGHTMAN, J. These sovereigns were not part of the goods in the shop, but money for which Holt had to account. He cannot be treated as a servant, because it would then follow that he was one of the persons appointing himself.

MARTIN, B. Holt had got the sovereigns in his own pocket, as it were, and suppose that while walking in the street some one had picked his pocket of them, could not the thief have been indicted for stealing his money?

T. Campbell Foster. The prisoner was assisting in the shop as a partner without salary.

WIGHTMAN, J. No. Holt had the sole management of the shop.

WILLIAMS, J. How does this case differ from Rex *v.* Bramley, R. & R. 478, where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, and it was held to be larceny, and the property to be well laid in the bailee?

POLLOCK, C. B. No doubt a man who has pawned his watch with a pawnbroker may be indicted for stealing it from the pawnbroker. The present case finds that Holt was in possession of the shop, and had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management, and therefore he may, *quoad hoc*, be treated as the owner.

By the COURT: *Conviction affirmed.*

ADAMS *v.* STATE.

SUPREME COURT OF NEW JERSEY. 1883.

[*Reported* 45 *New Jersey Law*, 448.]

KNAPP, J. The plaintiff in error was indicted for grand larceny at the May term of the Union Oyer and Terminer, the indictment charging her with having feloniously stolen certain goods and chattels as the property of Thomas W. Sloan, above the value of $20. She was tried before the Quarter Sessions of that county, convicted upon the trial, and sentenced to nine months' imprisonment at hard labor. The property was levied upon by Sloan as the property of Catherine Adams, under an execution which Sloan held, as constable, against her; the constable allowed the goods to remain at the house of the plaintiff in error, the place of the levy, she being informed of the levy. Before the time for sale under the execution, the plaintiff in error took and disposed of the goods.

The case comes up on exceptions to the refusal of the court to charge as requested, and upon the charge as made. The assignments of error present the question whether larceny may be committed by the general owner of property in taking it from one who has the special ownership, without felonious intent in such taking.

It is impossible, under ordinary circumstances, for one to commit larceny in taking possession of his own property, and the general owner of goods, in their lawful possession, has full dominion and control over such goods; but it seems to be well settled in the law that larceny may be committed by a man stealing his own property, if the taking be *animo furandi*, or with a fraudulent design to charge the bailee with the value of it. There is a passage found, as early as the time of the Year Books, in which it is said, "If I bail to you certain goods to keep, and then retake them feloniously, that I should be hung for it, and yet the property was in me."[1] This passage is found repeated in all the leading criminal treatises, but with the addition that the goods be taken with the fraudulent design to charge the bailee with their value. 1 Hale P. C. 513; 4 Bl. Com. 334; 2 East P. C. 558; Ros. Crim. Ev. 650. As if one delivers his goods to another, as his servant or bailee, and then steals them from such servant or bailee, with a fraudulent intent to charge him with their value, this would be larceny in the owner, although he might have had their possession through the lawful assertion of his title. On an indictment for larceny against such general owner, the property in the goods stolen may be laid as that of the special owner. The general property of goods levied on by execution is in the debtor, and remains in him until they are sold for the purpose of satisfying the execution; but the officer who levies acquires a special property in those goods, which entitles him to their possession until satisfaction be made of the execution. Dillenback *v.* Jerome, 2 Cow. 293; Smith *v.* Burtis, 6 Johns. 196. The defendant asked the court to charge the jury that there was a variance in the allegation of property in Sloan, and the proof upon the trial; that, therefore, the defendant should not be convicted. This the court refused to charge, and the evidence is brought here for examination as to the correctness of the court's action in so refusing; but upon the evidence it appears that Sloan, as already stated, had a special property in the goods, and they were therefore properly laid as his goods in the indictment. There was no error in refusing so to charge.[2]

The next exception is as to what the court did charge on the subject of ownership. By the bill of exceptions it appears that the court said that by virtue of the execution and levy "the constable became the owner of the goods levied upon until sold by him, and that if she took the goods, or assisted any one else in the taking, she is guilty." The part of the charge contained in this bill of exceptions is all we have of it. It would seem to be a sufficient statement of the law defining the rights which the constable acquires in virtue of a levy. It was made by the court in answer to the objection that the true ownership was not alleged in the indictment, and as respects that question the instruction of the court was correct. The constable's ownership was a qualified one, it is true, but it was sufficient to support the averment. The further statement in that portion of the charge, namely, "that if she took the goods or assisted any one else in taking them, she is guilty," may be subject to more criticism. It certainly is not a full presentation of the law. It is not every sort of taking of these goods that would make her criminally liable. It might have amounted to no more than a trespass or a conversion of the property as against the officer. The goods were left in her custody by the officer. As between them she may have been considered as a mere receiptor for the goods, with the right in the officer to deprive her of her possession and assume it himself. But she not only had their actual custody, but was as well the general owner, and could at any time before sale, by paying the judgment, remove the officer's hands entirely from her property. Now, unless her taking the goods was under such circumstances as in some way to fraudulently charge him with their value, it is difficult to find any recognized rule of criminal law that would hold her answerable for larceny.

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[1] Y. B. 7 Hen. VI. 43. — ED.

[2] *Acc.* People *v.* Long, 50 Mich. 249; Palmer *v.* People, 10 Wend. 165. — ED.

This case fails in resemblance to that of Palmer *v.* People, 10 Wend. 166, in this important feature: Palmer was convicted of having feloniously stolen property of one Jennings, who, as constable, had levied upon property by virtue of an execution against Palmer. The goods, by the officer's consent, remained with Palmer, who subsequently sold the shingles and charged the *constable* with having taken them away, and brought suit against him for their value upon that false allegation. This proof was held sufficient, on the ground that it charged a felonious taking of his own property, with intent to charge the constable with the value of it, bringing the case within the rule above stated as the ground of criminal liability. In this charge is found the broad proposition that any sort of taking or conversion by the general owner of property left in her possession by a constable possessed of the rights which a levy gives him, is a criminal act, and that of larceny. No fraudulent or evil design existing in the mind of the defendant is charged or intimated to be a necessary element of guilt. It would not be every taking by a mere stranger of these goods from the possession of the constable that would amount to larceny. A felonious intent would be a requisite ingredient in such crime. A conversion of the goods by a stranger who had been appointed their keeper by a constable, would not have been a crime but a civil wrong merely. To hold the general owner in possession to a severer rule seems to me to savor of illegal severity. I am unable, in the researches I have made, to find any case which warrants the ascription of criminality to such facts. The case of Rex *v.* Wilkinson, Russ. & Ry. 470, which goes as far as any other that I have found, presented the features of flagrant fraud on the part of the defendants, who were the real owners of the property, upon either the prosecutors or upon the Crown. As to which, the judges were divided in opinion. If we are permitted to look into the evidence which is handed us with the record, one can scarcely escape the conclusion that if the rule had been stated to the jury with the proper qualification, they must have failed to find in it evidence of such felonious design as would have raised the offence above that of a mere civil injury.

Whether the judge in other parts of his charge qualified the expressions in the opinion excepted to, we have no means of knowing; the charge is not before us. We have nothing but this pointed statement of his views of the law. We must assume that this embraced his entire instruction to the jury upon the legal requisites of guilt, and it was erroneous in a way that must have prejudiced the defendant in her trial. I think the judgment, for this error, should be reversed and a new trial ordered.

REX *v.* CABBAGE.

Crown Case Reserved. 1815.

[*Reported Russell & Ryan*, 292.]

The prisoner was tried before Thomson, C. B., at the Lent Assizes for the county of Lancaster in the year 1815, on an indictment for feloniously stealing, taking, and leading away a gelding, the property of John Camplin.

The second count charged the prisoner with feloniously, unlawfully, wilfully, and maliciously killing and destroying a gelding, the property of the said John Camplin, against the statute, etc.

The counsel for the prosecution elected to proceed upon the first count.

It appeared that the gelding in question was missed by the prosecutor from his stables on Monday, the 28th of February, 1815. The stable-door, it appeared, had been forced open. The prosecutor went the same day to a coal-pit, about a mile from the stable, where he saw the marks of a horse's feet. This pit had been worked out and had a fence round it, to prevent persons from falling in; one of the rails of this fence had been recently knocked off. A man was sent down into the pit, and he brought up a halter, which was proved to be the halter belonging to the gelding. In about three weeks after the finding of the halter, the gelding was drawn up from the coal-pit in the presence of the prosecutor, who knew it to be his. The horse's forehead was very much bruised, and a bone stuck out of it. It appeared that at the time this gelding was destroyed, a person of the name of Howarth was in custody for having stolen it in August, 1813, and that the prosecutor, Camplin, had recovered his gelding again about five weeks after it was taken. Howarth was about to take his trial for this offence when the gelding was destroyed in the manner stated. The prisoner Cabbage was taken into custody on the 27th of March, 1815; and on his apprehension he said that he went in company with Anne Howarth (the wife of Howarth, who was tried for stealing the said gelding) to Camplin's stable-door, and that they together forced open the door and brought the horse out. They then went along the road till they came to the coal-pit before mentioned, and there they backed the horse into the pit.

It was objected by the prisoner's counsel that the evidence in this case did not prove a larceny committed of the horse; that the taking appeared not to have been done with intention to convert it to the use of the taker, *animo furandi et lucri causa.*

THOMSON, C. B., overruled the objection, and the prisoner was convicted upon the first count of the indictment for stealing the horse. Judgment was passed on him, but the learned Chief Baron respited the execution to take the opinion of the judges as to the propriety of the conviction.

In Easter Term, 1815, the judges met to consider this case, and the majority of the judges held the conviction right. Six of the learned judges, namely, RICHARDS, B., BAYLEY, J., CHAMBRE, J., THOMSON, C. B., GIBBS, C. J., and LORD ELLENBOROUGH, held it not essential to constitute the offence of larceny that the taking should be *lucri causa;* they thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient; but some of the six learned judges thought that in this case the object of protecting Howarth by the destruction of this animal might be deemed a benefit, or *lucri causa.* DALLAS, J., WOOD, B., GRAHAM, B., LE BLANC, J., and HEATH, J., thought the conviction wrong.[1]

REX *v.* MORFIT.

CROWN CASE RESERVED. 1816.

[*Reported Russell & Ryan,* 307.]

THE prisoners were tried before Mr. Justice Abbott, at the Maidstone Lent Assizes, in the year 1816, upon an indictment for feloniously stealing two bushels of beans, value five shillings, the goods of John Wimble.

On the trial it was proved that the prisoners were servants in husbandry to Mr. Wimble and had the care of one of his teams; that Mr. Wimble's bailiff was in the habit of delivering out to the prisoners at stated periods, from a granary belonging to him, and of which his bailiff kept the key, such quantity of beans as Mr. Wimble thought fit to allow for the horses of this team. The beans were to be split and then given by the prisoners to the horses. It appeared that the granary-door was opened by means of a false key procured for that purpose, which was afterwards found hid in the stable; and that about two bushels of beans were taken away on the day after an allowance had been delivered out as usual, and nearly that quantity of whole beans was found in a sack, concealed under some chaff in a chaff-bin in the stable.

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[1] *Acc.* Williams *v.* State, 52 Ala. 411; People *v.* Juarez, 28 Cal. 380; Keely *v.* State, 14 Ind. 36 (*semble*); Warden *v.* State, 60 Miss. 638; Delk *v.* State, 64 Miss. 77; State *v.* Ryan, 12 Nev. 401; State *v.* Caddle, 35 W. Va. 73. *Contra,* Pence *v* State, 110 Ind. 95; People *v.* Woodward, 31 Hun, 57. See also Hamilton *v.* State, 35 Miss. 214; State *v.* Slingerland, 19 Nev. 135; State *v.* Davis, 38 N. J. L. 176; State *v.* Brown, 3 Strob. 508 (*semble*). — ED.

The learned judge desired the jury to say whether they thought both the prisoners were concerned in taking the beans from the granary; and also whether they intended to give them to Mr. Wimble's horses. The jury answered both questions in the affirmative.

Mr. Justice Bayley had, at the same Assizes, directed a verdict of acquittal under circumstances of the like nature; but ABBOTT, J., was informed that the late Mr. Justice Heath had many times held this offence to be larceny; and that there had been several convictions before him; and also that to a question put by the grand jury at Maidstone to the late Lord Chief Baron Macdonald, he had answered that in his opinion this offence was a larceny.

On account of this contrariety of opinion, the learned judge before whom this case was tried thought it advisable to submit the question to all the judges, the offence being a very common one; a verdict of guilty was taken, but judgment respited until the ensuing Assizes.

In Easter Term, 1816, eleven of the judges met and considered this case. Eight of the judges held that this was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of the horses, but the men's labor was lessened, so that the *lucri causa*, to give themselves ease, was an ingredient in the case. GRAHAM, B., WOOD, B., and DALLAS, J., thought this not a felony, and that the conviction was wrong.[1]

REX *v.* DICKINSON.

CROWN CASE RESERVED. 1820.

[*Reported Russell & Ryan*, 420.]

THE prisoner was tried and convicted before Mr. Justice Bayley at the summer Assizes for the county of Lancaster, in the year 1820, for stealing a straw bonnet, some other articles of female apparel, and a box.

It appeared that the prisoner entered the house where the things were in the night, through a window which had been left open, and took the things, which belonged to a very young girl whom he had seduced, and carried them to a hay-mow of his own, where he and the girl had twice before been.

The jury thought the prisoner's object was to induce the girl to go again to the hay-mow that he might again meet her there, but that he did not mean ultimately to deprive her of them.

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[1] *Acc.* Reg. *v.* Privett, 1 Den. C. C. 193. See Stat. 26 and 27 Vict. c. 103, § 1 —ED.

The learned judge doubted whether this was a felony, and discharged the prisoner upon bail, and reserved the case for the consideration of the judges.

In Michaelmas term, 1820, the judges met. They held that the taking was not felonious, and directed application to be made for a pardon.[1]

REX *v.* CRUMP.

Worcester Assizes. 1825.

[*Reported* 1 *Carrington & Payne*, 658.]

This prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag, the property of Henry Bateman.

It appeared that he got into the prosecutor's stable, and took away the horse and the other property all together; but that, when he had got to some distance, he turned the horse loose, and proceeded on foot to Tewkesbury, where he was stopped attempting to sell the saddles.

Garrow, B., left it to the jury to say, whether the prisoner had any intention of stealing the horse; for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be, in point of law, guilty of stealing the horse.

Verdict, Not guilty of stealing the horse; Guilty of stealing the rest of the property.[2]

REGINA *v.* SPURGEON.

Central Criminal Court. 1846.

[*Reported* 2 *Cox C. C.* 102.]

The prisoner was indicted for stealing a bag and some papers, the property of John Philpotts. From the evidence it appeared that the prosecutor, who was an attorney's clerk, had left the bag on a bench in the outer room of the Master's office of the Queen's Bench while he went into the inner office to transact some business. On entering the latter he saw the prisoner, who was asking charity, and who in a few minutes quitted the room. Shortly afterwards the prosecutor, on returning to the place where the bag had been left, discovered that it was gone. As he was returning to his employer's chambers, he met the prisoner in the street with the bag in his possession. On being given into custody the prisoner said that he took the bag believing that it had been accidentally left in the office by the owner, and that his intention was to restore it to him. It appeared that on a former occasion some papers which had been missed by the prosecutor were brought to his office by the prisoner, who received a shilling for his trouble.

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[1] *Acc.* Cain *v.* State, 21 Tex. App. 21. And see Reg. *v.* Jones, 1 Den. C. C. 188; U. S. *v.* Durkee, 1 McAll. 196. — Ed.

[2] *Acc.* Dove *v.* State, 37 Ark. 261; State *v.* York, 5 Harr. 493. — Ed.

The RECORDER (after consulting Mr. Justice Erle), in summing up the case to the jury. — You must be satisfied that the prisoner took this property against the consent of the owner, and for the purpose of gain. I am of opinion that it is not essential to the sustaining this charge, that he had an intention of converting this bag permanently to his own use. I will ask you, first, whether you think he took it with the intent to exact a reward from the owner for its restoration, and with a determination not to restore it unless such reward were given him. If such is your view of the circumstances, I shall have no hesitation in saying that the prisoner has committed larceny. Or, secondly, do you think, that having reasonable grounds for believing that the bag belonged to some person in the inner office, who had deposited it there for a short time until he should return for it, the prisoner took it with an intention of returning it absolutely, and at all events taking the chance of any reward being given him for the pretended service? Even in this case I am of opinion that he would be guilty of larceny; but I would reserve that question for the opinion of the judges before I passed sentence.

The jury returned the following verdict: —

Guilty of taking the property in order to exact a reward, and the prisoner would not have delivered it up without such reward.[1]

REGINA v. GARDNER.

CROWN CASE RESERVED. 1862.

[*Reported* 9 *Cox C. C.* 253.]

THE following case was reserved at the Middlesex Sessions.

Edward Gardner was tried on an indictment charging him in the first count with stealing one banker's cheque and valuable security for the payment of £82 19*s*., and of the value of £82 19*s*., and one piece of stamped paper of the property of James Goldsmith.

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[1] *Acc.* Reg. *v.* O'Donnell, 7 Cox C. C. 337; Com. *v.* Mason, 105 Mass. 163; Berry *v.* State, 31 Oh. St. 219. — ED.

In the second count the property was stated to be the property of Thomas Boucher.

It appeared from the evidence of Thomas Boucher, a lad of fourteen, that he found the cheque in question; that having met the prisoner, Gardner, in whose service he had formerly been, he showed it to him; that the prisoner (Thomas Boucher being unable to read) told him it was only an old cheque of the Royal British Bank: that he wished to show it to a friend, and so kept the cheque; that Boucher very shortly on the same day went to prisoner's shop and asked for the cheque; that the prisoner from time to time made various excuses for not giving up the cheque, and that Boucher never again saw the cheque.

It also appeared that the prisoner had an interview with Goldsmith, in which he said that he knew the cheque was Goldsmith's, asked what reward was offered, and upon being told 5*s.*, said he would rather light his pipe with it than take 5*s.*

The cheque has never been received either by Goldsmith or Boucher, though there was some evidence (not satisfactory) by the prisoner's brother of its having been inclosed in an envelope and put under the door of Goldsmith's shop.

The jury found "That the prisoner took the cheque from Thomas Boucher in the hopes of getting the reward; and, if that is larceny, we find him guilty."

Thereupon the judge directed a verdict of guilty to be entered, and reserved for the opinion of this court whether upon the above finding the prisoner was properly convicted.

November 15. *Best* (with him *Besley*) for the prisoner argued that the finding of the jury disproved the felonious intent. In Reg. *v.* York, 3 Cox Crim. Cas. 181, a similar finding of the jury was held to amount to "Not Guilty." (He was then stopped.)

Kemp, for the prosecution. The defendant read the cheque, and knew the owner. In this respect the case differs from Reg. *v.* Christopher, 8 Cox Crim. Cas. 91; 28 L. J. 35, M. C., and resembles Reg. *v.* Moore, 8 Cox Crim. Cas. 416; 30 L. J. 77, M. C. As against all the world but the true owner, the boy, Boucher, was the owner, and the prisoner took the cheque from him against his will, and may be convicted on the second count.

Pollock, C. B. That is the case of Armory *v.* Delamirie, Str. 505, where a boy was held entitled to sue his master for a jewel which he had found and his master had taken from him. It was not supposed that the master was guilty of felony. There the jewel was not earmarked, but every one who can read can tell to whom a cheque belongs. Properly speaking a cheque is not a chattel, and is not the subject of larceny. We must take it that the cheque was stamped, and being stamped it was not a piece of paper, — it was a cheque.

Cur. adv. vult.

November 22. Pollock, C. B. In this case the prisoner was convicted of stealing a cheque. He took the cheque away from a boy who found it, and did not immediately give information to the owner, but withheld it in the expectation of getting a reward. The taking of the cheque from the finder was not a felonious taking, and the merely withholding it in the expectation of a reward was not a larceny.

The rest of the court concurring.[1] *Conviction quashed.*

REGINA v. TREBILCOCK.

CROWN CASE RESERVED. 1858.

[*Reported* 7 *Cox C. C.* 408.]

AT the General Quarter Sessions of the Peace holden in and for the borough of Plymouth, on the 1st day of January, 1858, before Charles Saunders, Esq., Recorder, the prisoner, William Trebilcock, was tried on an indictment which charged him, first, with a larceny upon the Stat. 20 & 21 Vict. c. 54, § 4,[2] in having as bailee of plate, the property of the prosecutor, fraudulently converted it to his own use; secondly, with a common larceny of the same plate. The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, believing that he intended ultimately to return the property. The question for the opinion of the court is whether, consistently with the ground upon which the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

The case was this: The prosecutrix, Miss Palmer, resided at Plymouth, and going to London for eight or ten days, deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner's hands it was locked (the prosecutrix keeping the key), then covered with a wrapper sewed together, and sealed in a great number of places, and then tied with cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for London, he had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate, and offered it to one Woolf, at Plymouth, as a security for the advance of £50. The pawnbroker took up one of the pieces of plate which bore the crest and also a superscription with the name of Sir George Magrath upon it, and expressing his dislike to have anything to do with it, the prisoner said that he was under an engagement to be married to Lady Magrath. The prosecutrix had lived with Sir George Magrath, and when he died the plate, among other property, came into her possession. Woolf ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named Druiff, at Newport in Monmouthshire, with whom the prisoner had before had bill transactions. Druiff came to the prisoner at Plymouth and advanced him £200, taking bills for the amount, and the whole chest of plate worth from £500 to £600, as a collateral security for the loan. Druiff took the plate away with him to Newport. The prisoner, by way of accounting to Druiff for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir George Magrath, and that she had given him the plate to take care of till they were married. The prosecutrix went to London on the 8th day of November, and returned on the 17th of the same month. On her return the prosecutrix tried often to see the prisoner, but could not do so till the 26th. When she first saw him and asked him for the parcel, the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shop and private residence to see the prisoner, but could not see him again till the 2d of December, when the prosecutrix insisted upon instantly having her parcel. The prisoner said she could not have it as it was out of town, he had sent it to Bristol; then he said it was now farther than Bristol, that it was in Wales, but that he would write a letter and she should have it on Friday. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learned from the prisoner's father that Druiff had it. The inspector of police went to Newport and found the chest of plate there, but Druiff refused to give it up unless upon payment of the £200 for which it had been deposited with him as security. The prisoner could not redeem it, and upon the facts being made known to the prosecutrix she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

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[1] *Acc.* Reg. *v.* York, 3 Cox C. C. 181; Micheaux *v.* State, 30 Tex. App. 660. — ED.

[2] The section is as follows: "If any person being a bailee of any property shall fraudulently take or convert it to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny."

Upon the finding of the jury, with the recommendation to mercy above stated, the counsel for the prisoner contended that to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the judges shall have been obtained upon the question raised. If the court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly. If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

E. W. Cox, for the prisoner. The question is whether the recent statute 20 & 21 Vict. c. 54, § 4, alters the general law of larceny in any other respect than making a bailee liable.

LORD CAMPBELL, C. J. If this was larceny at all, it was larceny at common law. The statute would make no difference in this respect.

COLERIDGE, J. If not a larceny at common law, the new statute would not make it such; so that the only question is whether the prisoner could properly be convicted of larceny at common law. The jury have found him guilty.

E. W. Cox. Yes; but they recommended him to mercy on a ground which shows that a verdict of guilty is wrong. They found that he intended ultimately to return the property to the owner.

CROWDER, J. That is, if he could get it back again.

E. W. Cox. The law on this subject is distinctly laid down in R. *v.* Holloway, 3 Cox C. C. 145; and still more recently in R. *v.* Poole and Yeates, 7 Cox C. C. 373. In R. *v.* Holloway, Parke, B., said, that in order to constitute larceny there must be the intention to deprive the owner wholly of his property, to usurp the entire dominion over the chattels taken, and to make them his own; and Lord Denman used similar language, putting the case of a man taking a horse, with the intention of riding him throughout England, and then returning him.

COLERIDGE, J. But in this case the jury do not say that at the time of the taking the prisoner intended to return the plate.

LORD CAMPBELL, C. J. On the contrary they negative it by finding him guilty.

E. W. Cox. It is necessarily implied in their statement that when he parted with it to the pledgee, he had it in his mind to get it back again and restore it to the owner.

LORD CAMPBELL, C. J. Your general proposition of law is right enough, but it does not apply to this case.

E. W. Cox. If the court interprets the expression used by the jury as meaning only that at some time after the larceny the prisoner intended to return the property, the argument founded on R. *v.* Holloway necessarily fails. But that could not be the meaning of their finding. The alleged larceny was complete at the moment of depositing the plate with the pledgee. It was for that he was tried, and to that alone was the attention of the jury directed. They had nothing to do with any subsequent intent. Their conclusion could have had reference only to the felonious act charged in the indictment, and to the moment of committing it, and if they were of opinion that he had then an intention to return it, of which there is no doubt, he is not guilty of larceny.

Carter, for the prosecution, was not called upon.

LORD CAMPBELL, C. J. The general proposition contended for by

Mr. Cox is perfectly correct. To constitute larceny, there must be an intention on the part of the thief completely to appropriate the property to his own use; and if at the time of the asportation his intention is to make a mere temporary use of the chattels taken, so that the *dominus* should again have the use of them afterwards, that is a trespass, but not a felony; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law; abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and the jury have found a verdict of guilty. But they have recommended him to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now, I doubt whether what the jury say in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but even assuming it to be so, all that they say is, that he intended ultimately to return the property; not that at the time of the wrongful taking he originally intended to make a merely temporary use of it.

Coleridge, J. I am of the same opinion. There is no question about the law in this case; but the question is merely as to the facts. And upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then what must we do in order to make sense of the finding of the jury? It is to be observed that the recommendation to mercy in itself assumes that the verdict of guilty is correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain time, if he could get hold of it again, to restore the property, and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding, whilst the construction put upon it by Mr. Cox renders their conduct quite inconsistent and insensible.

Martin, B. I am of opinion that the recommendation to mercy and the words which accompanied it were no part of the verdict at all, and that when the jury said guilty there was an end of the matter, so far as the verdict was concerned. But I also think that even if it did form part of the verdict, it would not have the effect of bringing it within the principle of the cases on which Mr. Cox relies. It seems to me quite clear that this prisoner stole the plate, and then pledged it for £200, and I think that in so doing he "usurped the entire dominion of it" within the meaning of that expression as used by Parke, B., in the case cited. If, therefore, a special verdict had been found in the very terms used by the jury, when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

Crowder, J. It seems to me, also, that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box, and took out the plate, and stole it, but the jury recommended him to mercy because they thought that he had an intention of ultimately restoring it. Probably it very often happens that when stolen goods are pawned, there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty, when the offence of larceny is satisfactorily proved by the evidence.

WATSON, B. I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy, because they thought that he would ultimately have restored the property if he could have got it back.

Conviction affirmed.[1]

REGINA *v.* HOLLOWAY.

CROWN CASE RESERVED. 1849.

[*Reported* 3 *Cox C. C.* 241.]

THE prisoner, William Holloway, was indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on December 4th, 1848, for stealing within the jurisdiction of the court one hundred and twenty skins of leather, the property of Thomas Barton and another.

Thomas Barton and another were tanners, and the prisoner was one of many workmen employed by them at their tannery, in Liverpool, to dress skins of leather. Skins when dressed were delivered to the foreman, and every workman was paid in proportion to and on account of the work done by himself. The skins of leather were afterwards stored in a warehouse adjoining to the workshop. The prisoner, by opening a window and removing an iron bar, got access clandestinely to the warehouse, and carried away the skins of leather mentioned in the indictment, and which had been dressed by other workmen. The prisoner did not remove these skins from the tannery; but they were seen and recognized the following day at the porch or place where he usually worked in the workshop. It was proved to be a common practice at the tannery for one workman to lend work, that is to say, skins of leather dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman and get paid for it on his own account, and as if it were his own work.

A question of fact arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was to deliver them to the foreman and to get paid for them as if they were his own work; and in this way he intended the skins to be restored to the possession of his masters.

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[1] See Reg. *v.* Phetheon, 9 C. & P. 552; Reg. *v.* Medland, 5 Cox C. C. 292. — ED.

The jury, under direction of the court, found the prisoner guilty; and a point of law raised on behalf of the prisoner was reserved, and is now submitted for the consideration of the justices of either Bench and barons of the Exchequer.

"The question is, whether, on the finding of the jury, the prisoner ought to have been convicted of larceny.

"Judgment was postponed, and the prisoner was liberated on bail taken for his appearance at the next or some subsequent Court of Quarter Sessions to receive judgment, or some final order of the court."

Lowndes, in support of the conviction. The finding of the jury shows that the prisoner committed larceny.

PARKE, B. Is not this case governed by R. *v.* Webb, 1 Moody C. C. 431?

Lowndes. The cases are distinguishable. In that case, miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, removed from the heaps of other miners ore produced by them, and added it to their own heaps, the ore still remaining in the possession of the master; and it was held not to be a larceny. Here the skins were removed from the place in which they had been put by the master for custody into a place in which they were, in fact, in the prisoner's custody. In R. *v.* Webb, the ore was never out of the master's custody; in this case, the skins were distinctly out of the master's custody.

COLERIDGE, J. In the case of R. *v.* Webb there was the interval in which the ore passed from one heap to the other; was it not then out of the master's custody?

Lowndes. There was no intent to injure the owner in that case.

COLERIDGE, J. There was the intent to obtain payment for ore which the miner had not dug from the earth.

PARKE, B. It is essential that the taking should be with the intent to deprive the owner of the property in the thing taken; the jury did not find that in this case, but only that the intention of the prisoner was to get paid for the skins, as if they had been his own work.

Lowndes. It is not necessary that there should be the intention wholly to deprive the owner of the property; it is enough if the chattel is taken for the purpose of getting a benefit different from the mere use of it. In this case, though there was an intention to return the skins, there was not the intention that the owner should be put into the situation in which he was before the taking; for though he was to have the skins, he was to have them minus the wages.

PARKE, B. The taking must be with intent to acquire the entire dominion to the taker.

Lowndes. The taking must be treacherous, — for evil gain.

PARKE, B. East's definition is, "The wrongful or fraudulent taking or carrying away by any person of the mere personal goods of another person anywhere, with a felonious intent to convert them to his (the taker's) own use and make them his property, without the consent of the owner." 2 East Pl. Cr. 553.

Lowndes. In 3 Inst. 107, Lord Coke defines larceny to be "the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person nor by night in the house of the owner." Bracton and Fleta describe it as "Contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat." Bracton, lib. iii. c. 32, fol. 150; Fleta, lib. i. c. 36; Glanville, lib. vii. c. 17; lib. x. c. 15 follows Bracton. The "Mirror" gives the word "treacherensement;" that is, without a *bona fide* claim. In 4 Blackst. Com. 232, it is said that the taking must be "felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*." Blackstone, therefore, uses these phrases as synonymous.

LORD DENMAN, C. J. Suppose a man takes the horse of another with intent to keep him for a year, ride him through all the counties of England, and then return him; is that a larceny?

PARKE, B. There must be an intention in the taker to acquire the whole dominion over the thing, to make it his own; to do what he likes with it.

Lowndes. The facts in this case show a taking *lucri causa.*

PARKE, B. The case of R. *v.* Webb has decided otherwise.

ALDERSON, B. This is rather an obtaining money by false pretences than a larceny.

Lowndes. If this is not a larceny it would follow that if chattels were taken for the purpose of obtaining money for them by false pretences from the owner, and in that way converted to the use of the taker, he would not commit larceny. If the statement does not sufficiently show what offence has been committed, the case may be restated.

LORD DENMAN, C. J. No. The facts on which we are to decide must be stated at once. This court is not to be used to keep these cases alive.

ALDERSON, B. This will not prevent you from bringing an indictment for obtaining money under false pretences.

Lowndes. No money was obtained.

ALDERSON, B. The attempt to commit a misdemeanor is a misdemeanor; and if the removal of the skins amounted to such an attempt, the indictment may be preferred. The only question here is, whether the Recorder ought to have directed the jury to find a verdict of not guilty.

LORD DENMAN, C. J. If I thought the question was open after the authorities, I must say that a great deal might be urged in support of the proposition that these facts show a larceny to have been committed; because the owner is deprived of his property for some time, and the probability is that the intent distinguishing the case from larceny may be altered. The case which I put, of borrowing a horse for a year, without the owner's consent, with intent to ride it through England and then return it, shows this. But if we say that borrowing alone would constitute larceny, we are met by similar cases the other way. With regard to the definition of larceny, we have of late years said that there must be an intention to deprive the owner permanently of his property, which was not the intention in this case. We are not disposed to encourage nice distinctions in the criminal law; yet it is an odd sort of excuse to say to the owner, "I did intend to cheat you in fact and to cheat my fellow-workmen afterwards." This, however, is not an act which is not punishable; for if it is not a misdemeanor, which at the first sight it appears to be, it is an act done toward committing that misdemeanor. We must abide by former decisions, and hold that a conviction for larceny cannot in this case be supported.

PARKE, B. I am of the same opinion. We are bound by the authorities to say that this is not larceny. There is no clear definition of larceny applicable to every case; but the definitions that have been given, as explained by subsequent decisions, are sufficient for this case. The definition in East's "Pleas of the Crown" is, on the whole, the best; but it requires explanation, for what is the meaning of the phrase "wrongful and fraudulent"? It probably means "without claim of right." All the cases, however, show that, if the intent was not at the moment of taking to usurp the entire dominion over the property and make it the taker's own, there was no larceny. If therefore a man takes the horse of another with intent to ride it to a distance and not return it, but quit possession of it, he is not guilty of larceny. So in R. *v.* Webb, in which the intent was to get a higher reward for work from the owner of the property. If the intent must be to usurp the entire dominion over the property, and to deprive the owner wholly of it, I think that that essential part of the offence is not found in this case.

ALDERSON, B. I cannot distinguish this case from R. *v.* Webb.

COLERIDGE, J., concurred.

COLTMAN, J. We must not look so much to definitions, which it is impossible *a priori* so to frame that they shall include every case, as to the cases in which the ingredients that are necessary to constitute the offence are stated. If we look at the cases which have been decided, we shall find that in this case one necessary ingredient — the intent to deprive entirely and permanently — is wanting.

Conviction reversed.[1]

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[1] *Acc.* Rex *v.* Webb, 1 Moo. C. C. 431; Reg. *v.* Poole, 7 Cox C. C. 373. *Contra*, Fort *v.* State, 82 Ala. 50. — ED.

REGINA *v.* HALL.

CROWN CASES RESERVED. 1849.

[*Reported* 3 *Cox C. C.* 245.]

THE following case was reserved by the Recorder of Hull: —

John Hall was tried at the last Epiphany Quarter Sessions for the borough of Hull on an indictment charging him with stealing fat and tallow, the property of John Atkin.

John Atkin, the prosecutor, is a tallow-chandler, and the prisoner at the time of the alleged offence was a servant in his employment. On the morning of the 6th of December last, the prosecutor, in consequence of something that had occurred to excite his suspicions, marked a quantity of butcher's fat, which was deposited in a room immediately above the candle-room in his warehouse. In the latter room was a pair of scales used in weighing the fat, which the prosecutor bought for the purposes of his trade. At noon the foreman and the prisoner left the warehouse to go to dinner, when the former locked the doors and carried the keys to the prosecutor. At that time there was no fat in the scales. In about ten minutes the prisoner came back and asked for the keys, which the prosecutor let him have. The prosecutor watched him into the warehouse and saw that he took nothing in with him. In a short time he returned the keys to the prosecutor and went away. The prosecutor then went into the candle-room and found that all the fat which he had marked had been removed from the upper room, and after having been put into a bag had been placed in the scales in the candle-room. The prosecutor then went into the street and waited until a man of the name of Wilson came up, who was shortly followed by the prisoner. The latter on being asked where the fat came from that was in the scales, said it belonged to a butcher of the name of Robinson; and Wilson, in the prisoner's presence, stated that he had come to weigh the fat which he had brought from Mr. Robinson's. The prosecutor told Wilson that he would not pay him for the fat until he had seen Mr. Robinson, and left the warehouse for that purpose. Wilson immediately ran away, and the prisoner, after offering to the prosecutor's wife if he was forgiven to tell all, ran away too, and was not apprehended until some time afterwards, at some distance from Hull.

I told the jury that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Mr. Robinson, and with the intention of appropriating the proceeds to his own use, the offence amounted to larceny.

The jury found the prisoner guilty.

Dearsley, for the prisoner. There was no larceny in this case. The offence was an attempt to commit a statutable misdemeanor, and only punishable as such. The case of R. *v.* Holloway, 13 Cox C. C. 241, decides it. There was an asportation, but no intention to dispose of the property, for it was part of the very scheme that the owner should not be deprived of his property in the fat. There must to constitute larceny be a taking with intention of gain and of depriving the owner of the property forever. The last ingredient is wanting here. (He cited R. *v.* Morfit, R. & R. 307.)

Alderson, B. If a man takes my bank note from me, and then brings it to me to change, does he not commit a larceny?

Dearsley. A bank note is a thing unknown to the common law, and therefore the case put could not be larceny at common law.

Lord Denman, C. J. The taking is admitted. The question is whether there was an intention to deprive the owner entirely of his property; how could he deprive the owner of it more effectually than by selling it? To whom he sells it cannot matter. The case put of the bank note would be an ingenious larceny, but no case can be more extreme than this.

Parke, B. In this case there is the intent to deprive the owner of the dominion over his property, for it is put into the hands of an intended vendor, who is to offer it for sale to the owner, and if the owner will not buy it, to take it away again. The case is distinguishable from that of R. *v.* Holloway by the existence of this intent, and further by the additional impudence of the fraud.

Alderson, B. I think that he who takes property from another intends wholly to deprive him of it, if he intend that he shall get it back again under a contract by which he pays the full value for it.

Coleridge, J., and Coltman, J., concurred.

Conviction affirmed.[1]

REGINA *v.* BEECHAM.

Oxford Assizes. 1851.

[*Reported* 5 *Cox C. C.* 181.]

The indictment in the first count charged the prisoner with the larceny, on the 8th of February, 1851, of three railway tickets of the value of six pounds three shillings, and three pieces of pasteboard of the value of one penny, the property of the London and North Western Railway Company.

In a second count the tickets were described as the property of the station-master at the Banbury Road station.

It appeared in evidence that the prisoner was employed by the railway company as a porter in the goods department of the Banbury

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[1] *Acc.* Reg. *v.* Manning, 6 Cox C. C. 86. — Ed.

Road station. On the evening of the 8th of February he was drinking beer at the station with a witness of the name of Hazell, who was a horsekeeper employed at the station by an innkeeper. The station-clerk having about half-past eight o'clock in the afternoon left his office to work the electric telegraph in another compartment of the station, the prisoner went into the ticket-office, took out three first-class tickets for the journey from Banbury Road station to York, and stamped them in the machine for the "8th February." The last train for York for that day had been despatched a considerable time, and the prisoner tried to alter the stamping machine so as to re-stamp the tickets with another date, but failed in the attempt. He then gave one of the tickets to Hazell, saying, "There, you fool, when you want to go a long journey you need not pay; come here and do this."

Hazell mentioned the circumstance on the following day to the station-clerk, who went to the prisoner and taxed him with the offence, saying, "You have railway tickets in your pocket." The prisoner at first denied it, then said if he had them he did not know it, and eventually took the two tickets from his pocket. He immediately afterwards went to the station-master and told all the matter to him; the latter said the prisoner should pay for the tickets or be reported. A few days afterwards he was suspended from his employment and given into custody on this charge. It appeared in evidence that tickets stamped for one day might be re-stamped for another day and so become available.

At the close of the case for the prosecution,

Williams, for the prisoner, submitted that the second count of the indictment could not be sustained. The station-master had no property in the tickets, as he was the servant of the railway company, and merely had the custody of the tickets.

PATTESON, J., expressed his assent to that proposition.

Williams then objected with respect to the first count, that as the prisoner must have intended, supposing he took the tickets with a view to their use, that they should be returned to the company at the end of the journey, there was no such absolute taking away without an intention of restoration as was necessary to constitute a felony.

PATTESON, J., said his opinion was that it was a question for the jury to say whether the prisoner took the tickets with an intention to convert them to his own use and defraud the company of them.

Williams then addressed the jury, submitting to them that the prisoner took the tickets in a foolish incautious way as a joke, and without any intention whatever to defraud the company.

The learned judge in summing up told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether to give to friends or to sell them or to travel by means of them, it would not be the less larceny though they were to be ultimately returned to the company at the end of the journey.

Verdict, not guilty.

NELSON *v.* REX.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1902.

[*Reported* 1902, *A. C.* 250.]

APPEAL from a conviction by the above Court (Nov. 19, 1900) on an indictment charging the appellant with unlawfully and fraudulently taking and applying to his own use and benefit moneys and securities belonging to the Dumbell's Banking Company, Limited, of which he was a director, and against the sentence of five years' penal servitude passed upon such conviction by the said Court. That charge was made under s. 218 of a Statute of the Isle of Man Legislature, which section is as follows: —

"Whosoever being a director, member, or public officer of any body corporate or public company shall fraudulently take or apply for his own use or benefit or for any use or purposes other than the use or purposes of such body corporate or public company any of the property of such body corporate or public company shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to any of the punishments which the Court may award as hereinbefore last mentioned."

The charge related to sums drawn upon an account called the "C. B. Nelson Trust Account" between April 5, 1887, and August 7, 1892. It appeared that the cheques were openly drawn at the head office at Douglas upon this account. The account was open to inspection of the bank officials, and was returned amongst other accounts, weekly or monthly, to the head office in Douglas; and in the returns the name of the account and its total amount of indebtedness were set forth.

The overdraft on this account was for the purpose of the purchase of Allsopp's Brewery shares; and on each occasion of the resale of these shares the amount was placed to the credit of the account, and up to December, 1892, moneys were paid into and out of this account.

The appellant at the trial put in, and proved, a statement shewing his financial position on December 31, 1893 (more than sixteen months after the drawing of the last cheque set out in the indictment upon which he was convicted), by which it appears that at that time the appellant's assets exceeded his total liabilities by the sum of 19,123*l*.

Thereupon Deemster Shee remarked, "I don't see the materiality of all this. It does not matter what wealth a man has if he illegally uses the money of the bank." In summing up, he said: "Nelson made a strong point: how could he have been fraudulent when he took these overdrafts; he was solvent. If the jury thought it a satisfactory answer that it was not fraudulent, it was their duty to say so, and he was entitled to a verdict of 'Not guilty.' But that was a dangerous doctrine. Supposing these securities had been deposited with the bank, the argument would have been stronger. It was a dangerous doctrine to allow one director to do what another director could not; even though he thought himself solvent though he was not."

The jury, after being absent for six hours, informed the Court they were divided and unable to come to a verdict. The foreman said, "We differ on what in this case constitutes fraud within the meaning of the law. Some of the jurors are of opinion the defendants were solvent at the time of incurring the liabilities, and therefore not guilty of fraud." Deemster Shee thereupon said, "Is that the only difficulty you have?" and the foreman replied, "I think so, practically." Whereupon the Deemster gave the following ruling: —

Deemster Shee: "Well, solvency alone would not be sufficient evidence they were not guilty. It might be a matter for you to consider, but in my opinion solvency alone would not be evidence they were not guilty of fraud. It is an element for you to consider whether there was fraud. You have to consider the whole of the circumstances in the case: the date of the account; the fact that there were other overdrafts of the defendants; the size of the overdrafts; the way in which they were kept; and the account the prisoners have given of how they embarked in these transactions. All the circumstances in the case have to be taken into your consideration. To say, simply because one of the defendants was solvent that therefore he could not be guilty of fraud, would not be right. You must consider about the circumstances; and, considering the importance of the case, I should advise his Excellency to ask you to retire to consider your verdict again."

Finally a verdict was returned, "Guilty on the Nelson Trust Account only," with a recommendation to mercy.

The judgment of their Lordships was delivered by

LORD HALSBURY, LORD CHANCELLOR. This was a charge against the defendant of having fraudulently appropriated to his own use money of the Dumbell's Banking Company. Their Lordships are of opinion that there was no sufficient legal evidence against the defendant of that offence, and under those circumstances their Lordships will recommend that this part of the conviction, the only one on which leave to appeal has been given, should be set aside.

It is impossibe not to notice that the mode in which the question has been propounded from time to time, both by counsel and, one regrets to say, also by the learned Deemster himself, who presided, confuses what is the nature of the charge made with the general charge of irregularity in the conduct of the proceedings of the bank. That is not the criminal charge which was preferred by the indictment, and which ought to have been found by the jury. The charge was of fraudulently appropriating money of the bank.

The facts sufficiently shew that for a period of some years, beginning at all events as early as 1887, and going down to 1893, the person convicted was in the habit of drawing partly upon his own private account and partly on an account which was called a trust account, but still in his name, and that from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a bank is treated. Money was paid in and money was paid out, at one time a very large overdraft, and at another time that overdraft reduced to an amount of something like 300*l.* or 400*l.*, down to the period of two or three years after the trust account had first begun. Then it is suggested that after a period of six years altogether has elapsed it is possible to pick out some of the earlier drafts that have been made under the circumstances, and treat a particular draft as having been itself an offence — that is to say, a misappropriation of the money of the bank to the use and purposes of the person who drew it. The real truth is that, if what is suggested as the offence had been committed, every cheque was itself a theft. I use the phrase compendiously, because, although it is not stealing in the language of the statute, the elements of stealing must exist in it, and, in order to determine whether this offence has been committed in the sense which the law requires in order to sustain the conviction, one must see whether it is true to say that every one of those cheques so drawn, and the money obtained by reason thereof, was a theft.

Their Lordships are of opinion that there was no legal evidence of any such proposition. It may have been extremely irregular, and may have been wrong, and was wrong under the circumstances, of this bank to allow the account to have been entered into at all. The board ought to have been consulted, and the board ought to have given its consent in writing that such an account should be entered into, or, at all events, that overdrafts should not have been allowed on it; but that each of these transactions which is made the subject of indictment was practically a stealing of the money obtained by the cheque there appears to be no evidence whatever, and their Lordships are unable to see that the question was ever properly before the jury at all. It was a natural and proper inquiry by the jury which they made of the learned Deemster, whether or not they ought to have some guidance as to what was a fraud within the meaning of the law, because, as they explained, they were anxious to learn. Some of them thought there could be no fraud at the time, because the person was solvent who was drawing these cheques, to which inquiry no answer apparently was given by the learned Deemster in the language which the jury required, but he goes on to say that it is not conclusive that the defendant was not guilty because he was solvent — an entire inversion, their Lordships regret to observe, of what ought to have been told the jury at the time. Strictly, and as a matter of verbal accuracy, indeed it is not conclusive that the person was not guilty; but the question which the jurymen obviously desired to have answered was whether or not, given the circumstances of this case, the man being perfectly solvent at the time and having ample assets to answer the cheque which he was drawing, they ought to infer from the nature of the transaction that it was a taking or misappropriation within the meaning of the statute. Upon that it is impossible to say the jury received any guidance whatever.

In the result their Lordships are of opinion that there may have been ample evidence that the account was improperly obtained, and it may have been in one sense fraudulently obtained, but there is no evidence justifying the charge that this money was appropriated to the use of the person who drew the cheque in fraud of the right of the bank to have the money, and therefore that the offence contemplated by the statute was committed, or at all events there was no evidence of its being committed so as to justify the verdict of "guilty." For these reasons their Lordships will humbly advise His Majesty that the conviction of November 19, 1900, should be set aside.

There will be no order as to costs against the Crown.

PEOPLE *ex relatione* PERKINS *v.* MORSE.

COURT OF APPEALS OF NEW YORK. 1907.

[*Reported* 187 *N. Y.* 410.]

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 25, 1906, which reversed an order of Special Term dismissing a writ of *habeas corpus* and directed the discharge of the relator from custody.[1]

GRAY, J. . . . If the magistrate issued the warrant of arrest without sufficient evidence in the particular case, the process is a nullity. The question, always, must be whether the magistrate acquired jurisdiction to cause an arrest of the person and the court, upon the *habeas corpus* proceeding, will look back of his warrant and see if the facts stated in the depositions of the prosecutor and his witnesses support his warrant. (Code Crim. Proc. sec. 149; Church Hab. Corp. sec. 236.) If they did not furnish reasonable and just ground for a conclusion that the crime charged had been committed and that the defendant committed it, then jurisdiction was lacking to hold the prisoner in custody for any time. (Code Crim. Proc. sec. 150.)

The relator had the absolute right to question, in this way, the sufficiency of the facts laid before the magistrate to constitute the crime of larceny. That crime is defined in section 528 of the Penal Code, which reads, as far as material, as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, . . . having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, . . . any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

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[1] The detailed statement of facts is omitted; the facts will be found stated in the opinions. Part of each opinion is omitted. — ED.

It is apparent that what constitutes the crime of taking the property of another for the use of the taker, or of that of any other person than the legal owner, is the intention with which the act is committed. Under the statute, the crime of larceny no longer necessitates a trespass; but it does need, as an essential element, that the "intent to deprive or defraud" the owner of his property, or of its use, shall exist. The intent, by necessary implication, as from its place in the penal statute, must be felonious; that is to say, an intent without an honest claim of right. It is not now essential, as it was under the Roman and early English law, that the intention of the taker shall be to reap any advantage from the taking. The statute makes the crime to consist in the intent to despoil the owner of his property. That is necessary to complete the offence, and if a man, under the honest impression that he has a right to the property, takes it, it is not larceny if there be a colorable title. (See Code Crim. Proc. sec. 548; People *v.* Grim, 3 N. Y. Cr. Rep. 317; Bishop's Crim. Law, secs. 297, 851; Wharton's Crim. Law, secs. 883, 884.) The charge of stealing property is only substantiated by establishing the felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act which distinguish the criminal trespass from a mere civil injury. (1 Hale's P. C. 509; McCourt *v.* People, 64 N. Y. 583.) Doubtless, if the particular act was specified in the penal statute, an honest belief that it was right, while it would purge the act from immorality, would not relieve it from indictability. But when there is no statute on the subject and the act is not one which concerns the State directly, because affecting the peace, order, comfort, or health of the community, then the wrong done is private in its character and must be redressed by private suit. The act of the president of the insurance company, which the relator may be regarded as abetting (Sec. 29, Penal Code), that is the contribution of corporate funds for the purposes of a political campaign, was not *malum prohibitum*, or a prohibited wrong; for it was not until two years later that it was made a misdemeanor by the law of 1906. (L. 1906, ch. 239.) The legislature may make that criminal which was not so before, but we may not reason back of the enactment and predicate crime of an act which was lacking in criminal intent. It is of the very nature of crime that the criminal act shall involve the violation of a public law, or a wrong, which, because grossly immoral and vicious, affects the public injuriously.

If we turn then to a consideration of the facts, upon which the magistrate ordered the relator to be arrested, it is impossible, reasonably speaking, to find that criminal element which the statute makes a necessary one, the intent of the accused to steal.

When summed up the evidence amounts to this: that the president of the company, in whom was vested, and who had for years been exercising, the power to make disbursements of the corporate funds upon his sole authority, had agreed that the insurance company would contribute to the presidential campaign fund of the Republican national committee up to the amount of $50,000 and that, to protect the company against other demands for political purposes, he requested the relator, one of the company's trustees, to personally carry out the agreement by advancing the moneys. The relator acquiesced in the president's request, advanced the money, and, subsequently, the president brought up the subject of his reimbursement informally before a full attendance of the members of the finance committee of the company. The president's purpose was not that the finance committee should take official action in the matter, but that the trustees should be informed of what he had done, and that he might have their opinions upon the matter. It was the general opinion that the president should cause the relator to be reimbursed for his advances out of the corporate funds. The facts stated by the witnesses showed that what was brought before this body of the company's trustees was the claim, or right, of Mr. Perkins to be repaid the moneys which he had paid out by the procurement of the president, in order that the latter's agreement on behalf of the company might be carried out, and that the president, exercising the executive power, with which he appears to have been clothed, directed the treasurer of the company to draw the check for the amount of the relator's claim. Furthermore, the prosecution in making use before the magistrate of the relator's letter to the district attorney as an admission of the facts of the transaction complained of, not only made the fact clear that the moneys were paid out to satisfy the relator's claim, but, also, caused it to appear, affirmatively, that the relator had acted in the honest belief that he was benefiting the company and had derived no personal advantage. The magistrate was not bound to accept the letter as establishing the innocence of the accused, but as a part of the evidence used to make out the charge, he had his statements explaining the transaction and stating his honest motives. It was equivalent to his examination.

It is unquestionably true that the purpose for which the moneys of the company were promised was foreign to the chartered purposes of the corporation; but that fact does not make the payment a criminal act. The act not being *malum prohibitum*, nor *malum in se*, the innocent motive of indirectly promoting the corporate affairs, through the supposed advantage of the continuance in power of the Republican administration, purged the act of immorality, and it lacked the criminal intent. The company had not the right, under the law of its existence, to agree to make contributions for political campaigns any more than to agree to do other things foreign to its charter; but it had capacity to make agreements, if not prohibited or inherently wicked. Its act would affect the interests of those concerned with the conduct of the corporate business and effect a private wrong; but it would not be a public offence, or illegal, in the sense of violating any public interest. (Bissell *v.* M. S. & N. I. R. R. Co., 22 N. Y. 258; Holmes *v.* Willard, 125 ib. 75; Moss *v.* Cohen, 158 ib. 240.) If making the agreement to contribute from the corporate funds was an illegal act, it was because of the limitations upon the corporate powers and not because of considerations of the disadvantage to the company of the act. There are a great many things which those intrusted with the management of corporate properties are known to do and which they ought not to do, whatever their good motives, not because some statute forbids, but because they are not within the scope of the chartered powers. Their own sense of rectitude and of what is due to those who trust them should admonish them of the wrongful nature of their conduct. It has been well observed that the ultimate welfare of the citizen demands that he shall conform his conduct to the moral law, and it concerns him that every one else should conform to it. A moral obligation should be none the less authoritative in the conduct of life that it is binding only upon the conscience of the person as a duty, and is imperfect in law from the absence of legal sanction. Courts, however, may not sit to judge the conduct of a defendant by any moral code or rules of ethics. Their sphere is to ascertain if the facts shown establish the crime charged against him. In the facts stated in these depositions, I find none upon which criminality can be predicated. The essential element of the "intent to deprive and defraud" is nowhere to be found, and there is no just basis for the inference. There was no concealment about the transaction, and knowledge of it was conveyed to the other trustees. That the relator may have made a mistake of law, which will not relieve him from liability in a civil action, may be true, and he expressly disclaimed in his letter any intention to dispute such a liability; but this was a case where the intent, or good faith, was in issue and then knowledge of the law is immaterial. (Knowles *v.* City of N. Y., 176 N. Y. at p. 439; Goodspeed *v.* Ithaca St. Ry. C., 184 ib. at p. 354.) The relator came to the aid of the president of the company who, as such, had agreed to contribute moneys to the campaign fund, and advanced the moneys temporarily. Having done so, for no other reason than for the supposed advantage of the company, his claim to be reimbursed from the treasury of the company is openly presented and it is paid. But within the spirit, if not the letter, of section 548 of the Penal Code, that was not larceny. The section provides that "upon an indictment for larceny it is a sufficient defence that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable." This section is an expression of the emphasis which the statute lays upon the intent with which the property of another is taken. It is a qualification of the provisions of section 528 of the Penal Code, defining what shall constitute the crime of larceny. It is of considerable significance, as illustrating the legislative understanding, that when, in

1906, the legislature dealt with the question specifically the offence was declared to be a misdemeanor, not a larceny.

The question in this case was whether the facts evidenced the commission of a crime, and that was a question of law, which went to the jurisdiction of the magistrate. They showed that the design to injure, the motive to despoil the company, the wrongful purpose, were all lacking in the information which was laid before the magistrate, and upon which the warrant issued. This being so, the act of the magistrate was wholly without jurisdiction, and the warrant and all proceedings under it were absolutely void. (Hewitt *v.* Newberger, 141 N. Y. 538, 543).

For these reasons I advise the affirmance of the order appealed from.

Hiscock, J. I concur with Judge Gray in the affirmance of the order appealed from.

Stripped of any collateral and immaterial considerations, such as that of the consequences which may result to the magistrate issuing a warrant without any legal basis therefor, the naked question is whether any evidence was presented to such magistrate which showed reasonable ground for believing that the defendant had committed the crime of larceny. Unquestionably if there was no evidence justifying the inference of such guilt, the magistrate was without jurisdiction and the relator should be discharged.

This court seems to be wholly or practically unanimous in the opinion that the evidence presented to the magistrate would not be sufficient to sustain a conviction of the defendant for the alleged crime, and that he should be discharged if convicted thereon. The nature of this case, the attention which it has received, and the facts and circumstances disclosed render not at all violent the presumption that the district attorney has now presented all the evidence within his reach, and, therefore, it is quite probable that the really practical question involved is whether the relator shall be discharged at the present or at a subsequent stage of the proceedings. But however this may be, it will be conceded, as is argued in behalf of the appellants, that if even a slight degree of evidence of the relator's guilt was produced — "something upon which the judicial mind was called upon to act in determining the question of probable cause," the magistrate had jurisdiction, the warrant was valid and the order appealed from should be reversed.

We are all agreed upon certain fundamental principles pertaining to this case. The contribution by the president of the New York Life Insurance Company from its funds of $50,000 to a political campaign committee, even in the absence of any statutory prohibition, was absolutely beyond the purposes for which that corporation existed, and was wholly unjustifiable and illegal. And while the contribution was suggested and made by the authority and direction of the president of the company rather than by the relator, still the latter was so a party to the execution of the act that he must be regarded as having aided and abetted it, and, therefore, is criminally responsible if the crime was committed.

Further than this, the assumption will be made without critical analysis of its correctness in all respects, that because the relator understood when he advanced his own funds to Mr. Bliss that the same would be repaid to him with moneys of the corporation, he was from the beginning a party to the plan to appropriate such corporate funds to an unauthorized purpose, and that, therefore, when payment was made to him he did not occupy the position of a *bona fide* though mistaken claimant, and does not come within those provisions of section 548 of the Criminal Code which provide that it is a defence to an indictment for larceny "that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable."

But, confessedly, these facts and considerations alone are insufficient to justify the charge which has been laid against the relator. At the time of his arrest there was no statute making the contribution of corporate funds to political purposes of itself a crime, and, therefore, there must be some evidence that the relator in doing what he did was actuated by a felonious, criminal intent. It is agreed upon all sides that the crime of larceny may not be committed unintentionally, unconsciously or by mistake, but that in order to accomplish it the perpetrator must have the intent referred to. It may be difficult at all times exactly and satisfactorily to define this intent, but the requirement for it as applicable to this case means that when the relator took part in the appropriation of the moneys in question, he must have had in some degree that same conscious, unlawful, and wicked purpose to disregard and violate the property rights of another which the ordinary burglar has when he breaks into a house at night with the preconceived design of stealing the property of its inmates. There is, as there ought to be in the absence of statutory enactment, a long distance between the act which is unauthorized and illegal, and which subjects the trespasser to civil liability, and the one which is really wicked and criminal and which subjects the offender to imprisonment. It is on this point of criminal intent that I think the district attorney has failed to furnish any evidence whatever on which the magistrate might act, although the burden affirmatively rested upon him so to do.

At the outset it must be borne in mind that some of the circumstances which surround this charge are merely accidental and superficial, and not at all decisive. The fact that this contribution was made by the officers of one of those corporations whose management recently has been subjected to grave criticism, and even that it was made for a purpose properly subjected to condemnation and now absolutely prohibited, are of no legal significance. However public opinion or ethics might distinguish them, the legal principles which control the consideration of this case are the same which would be applicable if the president of a manufacturing corporation had contributed from its funds toward the erection of a church supposed to be for the benefit of its employees, or the officers of a railroad company had contributed its funds or the use of its property and transportation facilities for the temporary relief of the sufferers from some sudden and great calamity. We probably should be compelled to say in each case that the contribution was beyond the purposes of the corporation and unauthorized and illegal, and the officers making the same civilly liable, but it certainly would be a matter of grave import to hold, in the absence of something else, that they might be prosecuted for stealing.

It, therefore, seems to me that we are justified in scrutinizing with care the depositions presented to the magistrate for the purpose of ascertaining whether they do in fact disclose any intent to commit a crime.

These facts are all established and must be accepted by the prosecution as true, and there is wanting every one of those circumstances of personal gain, furtive secrecy in the commission of the act and of concealment after commission which, as essential elements, ordinarily attend the crime of larceny, and if there is any evidence here of a criminal intent, it is found simply and solely in the fact that the officers of the corporation have contributed some of its funds to an unauthorized purpose. As already indicated it does not seem to me that this fact is sufficient to sustain the burden thus cast upon it.

In McCourt *v.* People (64 N. Y. 583) the plaintiff in error stopped at a house and asked the daughter of the owner for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, and, although forbidden to do so by her, went in and drew some cider. He was indicted for burglary and larceny, and it was held that the trial court committed error in refusing to direct his acquittal. It was said: "Every taking by one person of the personal property of another without his consent is not larceny; and this, although it was taken without right or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be a crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury." And then further, as applicable to the particular circumstances of that case, "There was not only an absence of the usual indicia of a felonious taking, but all of the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention in the absence of the ear marks which ordinarily attend and characterize it."

It is true that this was said with reference to the evidence produced upon a trial, but a decision denying as matter of law to given facts the requisite probative force must be applicable at any other stage where there is need for such proof.

Cullen, C. J. . . . Something is also said in the opinion below of the beneficent character of the purpose to which the money was appropriated. Of that we can hardly take judicial notice. Probably at all times it would be regarded as beneficent in Vermont and maleficent in Georgia, while in New York its character would vary from year to year. The meritorious character of the object to which the money was appropriated has no bearing on the question of larceny. The gist of that offence is not the application of money to a bad purpose, but taking money that does not belong to the taker to appropriate to an object good or bad. It is the fraudulent deprivation of an owner of his property that constitutes larceny. It is a crime to steal, even though with the intent to give away in charity and relieve distress. (Regina *v.* White, 9 C. & P. 434.) I do not assert that it is immaterial which party is in control of the government of the nation, and that the subject is a matter of indifference to the citizen. If this were so, the profession of political faith would be mere hypocrisy. If the citizen, with his own means, contributes to legitimate political expenses to secure the success of the party which he deems will most inure to the welfare of the nation, his action is laudable, and even if the inducement be the belief that the success of that party will inure to the advancement of his personal interest, as distinguished from that of the country at large, it may be justifiable; but to apply the money of another without his consent to such an object is neither laudable nor justifiable, but dishonest. The money given to Bliss belonged neither to the president nor to the relator, but was simply in their custody. Its legal owner was the artificial being, the corporation; its beneficial owners were the policy-holders. With the immense business carried on by the corporation, policies issued in every part of the country and to persons of every political party, both the relator and the president must have well known that the universal assent of the policy-holders, the only thing which could have justified, even morally (not legally), the payment to Bliss, could never be obtained and that at all times a substantial minority would be opposed to such payment. But though there was an illegal misappropriation of the corporate funds by the relator, this does not necessarily prove that he was guilty of larceny. It may have been simply a trespass for which he is only civilly liable. I agree with Judge Gray that to constitute larceny there must be what is termed a felonious intent, but we do not make progress towards the determination of the question before us unless we ascertain what is a felonious intent. The question has given rise to much discussion in text books and in judicial opinions. Whether "intent" is the proper term to employ may be doubted. Though a man may commit many statutory offences unwittingly, no one can become a thief or an embezzler accidentally or by mistake. To constitute the offence there must be in the perpetrator the consciousness of the dishonesty of the act. This, however, as frequently turns on the knowledge or belief of the party as to his authority as on his intent regarding the disposition of the property. It is not necessary either at common law or under the statute that the intent should be the profit of the taker, for as already said, it is theft to take property to give away as well as to keep for oneself. In the present case no one will doubt that had a clerk taken from the company's till a sum of money to give to the Republican club of his ward, it would have been larceny. Whatever distinction there may be between the hypothetical case and that of this relator does not lie in the object for which the moneys were appropriated, for that in each case would be the same, but in the difference between the authority over the corporate funds possessed by the mere clerk and by the president and vice-president. The clerk, of course, would know that he had no authority to so divert the corporate funds; the president and the relator might, though they should have known to the contrary, possibly have entertained a different view on the subject. This brings us to the real and, to my mind, the only question in this case. As has been already said, the relator and the president of the company, without the authority of the corporation and knowing that all the beneficial owners would never assent to the act, took the moneys of the company without consideration and appropriated them to the exclusive use of a third party. The relator must be presumed to have known the law and to have intended the natural consequences of his acts, which was to deprive the company of the money. If he knew the illegality of his act and his intention was solely to benefit either Mr. Bliss personally or the political organization which he represented, then he was guilty of larceny. If, however, as asserted in his statements to the district attorney, he believed that the expenditure would be for the benefit of the company and that the president had the power to make the same, then, however mistaken on the subject, he was not guilty. This was necessarily and properly a question of fact to be determined by the magistrate, not one of law. Though the prosecution put in evidence before the magistrate the written statement of the relator, the magistrate was at liberty to believe it or to reject it in whole or in part. (People *v.* Van Zile, 143 N. Y. 368; Becker *v.* Koch, 104 id. 394; President, etc., Manhattan Co. *v.* Phillips, 109 id. 383.) The indirect method in which the payment to Bliss was made and the fact concealed by having the money in the first instance advanced by the relator instead of by the company, and the method in which the relator was reimbursed by a check, not to him personally, but to the order of J. P. Morgan & Company, a banking firm with which the corporation may have large legitimate dealings, casts suspicion on the good faith of the relator, and might be considered by the magistrate as militating against him. The explanation of this course offered by the relator, that it was to relieve the president from solicitations from other political parties, might also be discredited. It is difficult to imagine how the representatives of other parties would have access to the company's books; nor would the scheme of payment enable the officers of the company when solicited to say that the company had made no contributions to other parties, because such an answer would be as essentially a falsehood as if the money had been paid by the company in the first instance. The concealment of the payment as described would warrant the magistrate in finding that the parties were conscious of wrongdoing in making it and feared exposure. The relator asserts that he was ignorant of the character of the entries made in the company's books, and there is no proof to the contrary of this statement. But he must have known that the cheque to pay him was drawn, not to himself, but to Morgan & Company. On the other hand, there is, doubtless, to be considered in the relator's favor the fact that he made no pecuniary profit by the transaction, and that he afterwards openly admitted his participation in it. All this, however, merely raised a question of fact to be passed on by the magistrate, with whose determination other courts cannot interfere in this proceeding. . . .[1]

O'BRIEN and EDWARD T. BARTLETT, JJ., concur with GRAY and HISCOCK, JJ.; CHASE, J., concurs with CULLEN, Ch. J., and WERNER, J.

Order affirmed.

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[1] WERNER, J., delivered a dissenting opinion. — ED.

SECTION VII.

Aggravated Larceny.

(*a*) Robbery and Larceny from the Person.

REX *v.* FRANCIS.

King's Bench. 1735.

[*Reported* 2 *Strange*, 1015.]

The defendants were indicted at the Assizes in Somersetshire, for that they feloniously made an assault on Samuel Cox in the king's highway, and put him in fear, and £9 in money from the person of Cox did take, steal, and carry away. Upon not guilty pleaded by all the defendants, the jury find this special verdict : —

That Samuel Cox travelling on horseback on the king's highway to Somerton Fair, on a place called King's Down Hill in the county of Somerset, saw all the prisoners in company together, one of whom was then lying on the ground ; that Cox passed by them, and one of them (but which the jury do not know) called to Cox, and desired him to change half a crown, that they might give something to a poor Scotchman then lying on the ground, who was one of the prisoners. Cox came back, and putting his hand in his pocket to pull out his money in order to give them change as they desired, he pulled out four moidores and a Portugal piece, value £3, 12 *s.*, and having the pieces of gold in his hand, John Francis, one of the prisoners, gently struck Cox's hand, in which he held the gold, by means whereof the gold fell on the ground ; that thereupon Cox got off from his horse, and said to the prisoners that he would not lose his money so ; and the said Cox then and there offering to take up the pieces of gold, which were then upon the ground, and in Cox's presence ; the prisoners then and there swore that if he touched the pieces of gold they would knock his brains out ; whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold. That the prisoners then and there immediately took up the gold, and got on their horses, and rode off with the gold : that Cox immediately thereupon pursued them, and rode after them for about half a mile ; and then the prisoners struck him and his horse, and swore that if he pursued them any farther they would kill him ; by reason of which menace he was afraid to continue his pursuit any farther ; but whether upon the whole matter the prisoners are guilty of the felony and robbery charged on them the jury doubt, and pray the advice of the court. *Et si, &c.*[1]

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[1] Upon a second argument it was determined that the special verdict did not state with sufficient certainty whether the taking was in the presence of the prosecutor.— Ed.

This special verdict and the prisoners were removed into the King's Bench, where it was twice argued at the bar. And upon the first argument the only question was, whether a taking in the presence be in point of law a taking from the person, and it was unanimously determined that it was.[1]

REGINA *v.* SELWAY.

CENTRAL CRIMINAL COURT. 1859.

[*Reported* 8 *Cox C. C.* 235.]

THE prisoners were indicted for robbery and stealing from the person.[2] The evidence showed that the prosecutor, who was paralyzed, received, while sitting on a sofa, in a room at the back of his shop, a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room, and stole therefrom a cash box, with which he made off.

Orridge, for the prisoners, submitted that on this evidence there was no proof of a stealing from the person. The cash box at the time it was stolen was at some distance from the place where the prosecutor was sitting, and could not be said, therefore, to be about his person.

Robinson, for the prosecution, contended that it was quite sufficient for the purposes of the indictment to show that the cash box was under the protection of the prosecutor; it need not be in his bodily possession. He was near enough to it to protect it, at least by raising an alarm. It was laid down in 1 Hale P. C. 533, "If a thief put a man in fear, and then in his presence drive away his cattle, it is a robbery. So, if a man being assaulted by a robber throw his purse into a bush, or flying from a robber let fall his hat, and the robber in his presence take up the purse or hat and carry it away, this would be robbery."

The COMMON SERGEANT, having consulted Mr. Justice Crowder and Mr. Baron Channell, held that although the cash box was not taken from the prosecutor's person, yet it being in the room in which he was sitting, he being aware of that fact, it was virtually under the protection of his person. He should under the circumstances leave this question to the jury: Was the cash box under the protection of the prosecutor's person at the time when it was stolen?

The jury found that it was. *Guilty.*[3]

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[1] *Acc.* U. S. *v.* Jones, 3 Wash. C. C. 209, 216. See Clements *v.* State, 84 Ga. 660; State *v.* Calhoun, 72 Ia. 432. — ED.

[2] "Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony." 24 & 25 Vict. c. 96, s. 40, re-enacting 7 Wm. IV. and 1 Vict. c. 87, s. 5. — ED.

[3] See Com. *v.* Dimond, 3 Cushing, 235. — ED.

SECTION VII. (*continued.*)

(*b*) Larceny from a Building.

COMMONWEALTH *v.* HARTNETT.

Supreme Judicial Court of Massachusetts. 1855.

[*Reported* 3 *Gray*, 450.]

Indictment on St. 1851, c. 156, § 4, for larceny in a building of Timothy Hartnett. At the trial in the municipal court, it appeared that the said Timothy was the husband of the defendant; and the defendant contended that she could therefore be convicted of simple larceny only. But Hoar, J., ruled that the evidence was sufficient to sustain the charge of larceny in a building. And to this ruling the defendant, being found guilty, alleged exceptions.

J. A. Andrew, for the defendant.

J. H. Clifford (Attorney General), for the Commonwealth.

Metcalf, J. The defendant is convicted of larceny in a building owned by her husband; and as the indictment does not aver that it was committed in the night time, it must be taken to have been committed in the daytime. St. 1843, c. 1, § 2. The question is whether the defendant is liable to the punishment prescribed by St. 1851, c. 156, § 4, for larceny "in any building," or only to the punishment elsewhere prescribed for simple larceny.

Larceny in the daytime, in a dwelling-house and in certain other buildings, not broken into, was first subjected, in Massachusetts, to greater punishment than if not committed therein, by St. 1804, c. 143, § 6; to wit, solitary imprisonment of the offender, in the state prison, not exceeding six months, and confinement there afterwards to hard labor, not exceeding five years. By St. 1830, c. 72, § 3, courts were authorized to sentence such offender to confinement in the county jail, not exceeding five years, or to the payment of a fine, according to the nature and aggravation of the offence. By the Rev. Sts. c. 126, § 14, it was thus enacted: "Every person who shall steal, in the daytime, in any dwelling-house, office, bank, shop or warehouse, ship or vessel, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the country jail, not more than two years." By St. 1851, c. 156, § 4, "every person who shall commit the offence of larceny, by stealing in any building, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars, or imprisonment in the house of correction or county jail, not exceeding three years." For simple larceny, that is, for theft not aggravated by being from the person, nor by being committed in a dwelling-house or other building, ship, or vessel, a lighter punishment is prescribed by the Rev. Sts. c. 126, § 17, and c. 143, § 5. And we are of opinion that the defendant is liable only to that lighter punishment.

We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts. 7 Dane Ab. 168. Yet the provisions of some of them, and the provisions of acts of Parliament for the punishment of other offences, have been enacted by our legislature, in every stage of our history. And in such cases (as well as in cases where English statutes respecting civil concerns have been enacted here), it has always been held that the construction previously given to the same terms, by the English courts, is the construction to be given to them by our courts. It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one state or country, is afterwards passed by the legislature of another. So when the same legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is, that its terms would be so changed as to effect that intention. 6 Dane Ab. 613; Kirkpatrick *v.* Gibson's Ex'ors, 2 Brock. 388; Pennock *v.* Dialogue, 2 Pet. 18; Adams *v.* Field, 21 Verm. 266; Whitcomb *v.* Rood, 20 Verm. 52; Rutland *v.* Mendon, 1 Pick. 156; Myrick *v.* Hasey, 27 Maine, 17. There are many instances in which our legislature have made punishable, as offences, acts which were first made so by English statutes. Among others are our statutes concerning the fraudulent obtaining of money or goods by false pretences. In all such cases, the construction given by the English courts is deemed to be the true one, when the statutes are alike. And we have already stated, that the act of stealing in certain buildings was first made an aggravated larceny, and subjected to a greater punishment than before, by St. 1804, c. 143. Yet by the English St. 12 Anne, c. 7 (passed in 1713, and now repealed), it was enacted that "all and every person or persons that shall feloniously steal any money, goods or chattels, wares or merchandises, of the value of forty shillings or more, being in any dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons be or be not in such house or outhouse, being thereof convicted, shall be absolutely debarred of and from the benefit of clergy." And by the English St. 24 G. II. c. 45, a like provision was made in cases of conviction of the offence of feloniously stealing goods, wares, or merchandise, of the value of forty shillings, in any ship, barge, lighter, boat, or other vessel, upon any navigable river, or in any port of entry or discharge. But it was early decided that the first of these statutes did not extend to a stealing by one in his own house, nor to a stealing by a wife in her husband's house, which is the same as her own. The intention of the statute was declared to be, to protect the owner's property in his own house from the depredation of others, or the property of others lodged in his house; thereby giving protection against all but the owner himself. It has also been decided that the property stolen must be such as is usually under the protection of the house, deposited there for safe custody, and not things immediately under the eye or personal care of some one who happens to be in the house. 2 East P. C. 644–646; The King *v.* Gould, 1 Leach (3d ed.), 257; The King *v.* Thompson & Macdaniel, 1 Leach, 379; The King *v.* Campbell, 2 Leach, 642. See also Rex *v.* Taylor, Russ. & Ry. 418; Rex *v.* Hamilton, 8 C. & P. 49; Rex *v.* Carroll, 1 Mood. C. C. 89. And it has also been held that the St. 24 G. II. c. 45, does not extend to stealing by the owner and master of a vessel. Rex *v.* Madox, Russ. & Ry. 92.

We are of opinion that the purpose and intent of St. 1804, c. 143, § 6, and of the Rev. Sts. c. 126, § 14, were the same as the purpose and intent of St. 12 Anne, c. 7, and that they must have the same construction which was given to that before these were enacted. Indeed, the attorney general frankly admits this, and that he cannot ask for sentence against the defendant, as for an aggravated larceny, unless it is required or warranted by St. 1851, c. 156, § 4. We think that statute has not altered the law in this matter; that it has only made larceny "in any building," an aggravated offence, as former statutes made it when committed in certain enumerated buildings; and that it has not subjected to the punishment therein prescribed any larceny which, if committed in either of those buildings, would not have been liable to such punishment. The statute was passed in consequence of the decision, in Commonwealth *v.* White, 6 Cush. 181, that the passenger room of a railroad station was not an "office," within the meaning of the Rev. Sts. c. 126, § 14.

Defendant to be sentenced for simple larceny.[1]

COMMONWEALTH *v.* SMITH.

Supreme Judicial Court of Massachusetts, 1873.

[*Reported* 111 *Massachusetts*, 429.]

Indictment alleging that the defendant, on April 14, 1872, at Braintree, certain bank notes "of the property, goods, and moneys of James Gilbride, in a certain building there situate, to wit, the dwelling-house of one Patrick McGuire, and then and there in the possession of the said James Gilbride, being found, feloniously did steal, take, and carry away."

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[1] *Acc.* Rex *v.* Gould, Leach (4th ed.), 257. Otherwise, in England, under Stat. 7 & 8 G. IV. ch. 29, § 12; Reg. *v.* Bowden, 2 Moo. C. C. 285. — Ed.

At the trial in the Superior Court in Norfolk, before Putnam, J., the Commonwealth introduced evidence tending to show that the defendant and James Gilbride lodged together in the same room of McGuire's house; that Gilbride went to the room where the defendant was already in bed, put the money in his trunk, locked the trunk, put the key of it in his pocket, undressed, put his clothes on a chair, and went to bed; that the defendant got up in the night, took the key from the pocket, opened the trunk, took out the money, and returned the key to the pocket. Gilbride testified that he was awakened in the night, and saw Smith with a lighted match at one of the trunks in the room, but did not know it was his own trunk, and thought nothing more of it, until he missed the money.

The defendant asked the judge to rule that upon this evidence the jury could not find the defendant guilty of larceny in a building, but only of simple larceny. The judge declined so to rule, and left it to the jury under instructions which authorized them to find the defendant guilty of larceny in a building. The jury returned a verdict of guilty.

The defendant then moved in arrest of judgment on the ground that the indictment did not aver that the larceny charged was committed in any building, but the judge overruled the motion.

The defendant alleged exceptions.

W. E. Jewell, for the defendant.

W. G. Colburn, Assistant Attorney General (*C. R. Train*, Attorney General, with him), for the Commonwealth.

GRAY, J. The indictment duly charges larceny in a building. The allegation that the defendant stole property in the dwelling-house described necessarily includes a statement that the act of stealing was done in the building. And the whole charge was supported by the proof. In order to constitute larceny in a dwelling-house or other building, the property stolen must indeed be under the protection of the house, and not under the eye or personal care of some one who happens to be in the house. The King *v.* Owen, 2 Leach (4th ed.), 572; Commonwealth *v.* Hartnett, 3 Gray, 450, 452. But money of a lodger in his trunk, as well as the key of the trunk in a pocket of his clothes, is clearly, while he is in bed, undressed, and asleep, not under his own protection, but under the protection of the house. Rex *v.* Taylor, Russ. & Ry. 418; Rex *v.* Hamilton, 8 C. & P. 49. The defendant was therefore rightly convicted of larceny in a building.

Exceptions overruled.[1]

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[1] *Acc.* Rex *v.* Taylor, Russ. & Ry. 418. — ED.

COMMONWEALTH *v.* LESTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1880.

[*Reported* 129 *Massachusetts,* 101.]

AMES, J.[1] In an indictment founded upon the Gen. Sts. c. 161, § 15, for larceny in a building, it is not enough to prove that the property stolen was in a building at the time of the theft, and that the defendant was the thief. It is necessary to show also that the property was under the protection of the building, placed there for safe keeping, and not under the eye or personal care of some one in the building. The watches in this case were a part of the owner's stock in trade, usually kept by him in the building. But his testimony, which was the only evidence to the point, is to the effect that he was in charge of the property, when the defendant came in and asked to look at some watches, and that he handed the watches to the defendant; that he was not sure whether the defendant held the watches in his hand, or whether they were lying on the show-case; and that they were stolen while he turned partially round to place something upon the shelf behind him. If they were upon the show-case when stolen, it would be at least doubtful whether they must not, under the circumstances, be considered as rather in the possession of the owner than under the protection of the building. If by the act of the owner they were in the hands of the defendant, they certainly derived no protection from the building. As the evidence left it wholly uncertain whether they were on the show-case or in the defendant's own hands, it did not warrant a conviction of larceny in a building; and the jury should have been so instructed. Rex *v.* Campbell, 2 Leach (4th ed.) 564; Rex *v.* Castledine, 2 East P. C. 645; Rex *v.* Watson, 2 East P. C. 680; s. c. 2 Leach, 640; Rex *v.* Hamilton, 8 Car. & P. 49, 50, note; Commonwealth *v.* Smith, 111 Mass. 429.

Exceptions sustained.[2]

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[1] The opinion only is given; it sufficiently states the case.

[2] *Acc.* Rex *v.* Campbell, Leach (4th ed.). 642. *Contra,* Simmons *v.* State, 73 Ga. 609. See Com. *v.* Nott, 135 Mass. 269. — ED.

CHAPTER IX.

EMBEZZLEMENT.

REX *v.* HEADGE.

CROWN CASE RESERVED. 1809.

[*Reported Russell & Ryan,* 160.]

THE prisoner was tried and convicted before Mr. Justice Bayley at the Old Bailey Sessions, September, 1809, on the statute 39 G. III. c. 85, for embezzling three shillings, which he received for and on account of his masters, James Clarke and John Giles.

It appeared from the evidence that the prosecutors desired a neighbor, one Francis Moxon, to go to their shop and purchase some articles in order that they might discover whether the prisoner put the money which he received for the goods sold into the till; the prosecutors supplied Moxon with three shillings of their own money for this purpose, which money they marked. Moxon went to the shop, bought the articles, and paid the prisoner the three shillings. The prisoner embezzled this money.

It was urged on behalf of the prisoner that the prosecutors had constructively the possession of this money up to the time of the embezzlement and that they had parted with nothing but the mere custody. The prisoner it was contended might have been indicted for larceny at common law, but that the statute did not apply to cases where the money before its delivery to the servant had been in the masters' possession and might legally be considered the masters' at the time of such delivery, as Moxon in this case was the masters' agent and his possession theirs.

The learned judge before whom this case was tried thought it deserved consideration, and reserved the point for the opinion of the judges.

In Michaelmas term, 1809, the judges met and held the conviction right, upon the authority of Bull's case, in which the judges upon similar facts held a common-law indictment could not be supported. It seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law.

REGINA *v.* CULLUM.

Crown Case Reserved. 1873.

[*Reported Law Reports,* 2 *Crown Cases Reserved,* 28.]

Case stated by the Chairman of the West Kent Sessions.

The prisoner was indicted as servant to George Smeed for stealing £2, the property of his master.

The prisoner was employed by Mr. Smeed of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo and from such persons as his master should direct. The prisoner had no authority to select a return cargo or take any other cargoes but those appointed for him. The prisoner was entitled by way of remuneration for his services to half the earnings of the barge after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed and asked if he should not on his return take a load of manure to Mr. Pye of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston. Going from London to Murston he would pass Caxton. Notwithstanding this prohibition the prisoner took a barge-load of manure from London down to Mr. Pye at Caxton, and received from Mr. Pye's men £4 as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the £4 said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December the prisoner returned home to Sittingbourne and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the £4 received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty as servant to Mr. Smeed of embezzling £2.

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement. 24 & 25 Vict. c. 96, § 68, enacts that " Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed. . . ."

No counsel appeared for the prisoner.

E. T. Smith (with him *Moreton Smith*) for the prosecution. The prisoner received this freight either "for" or "on account of his master or employer," and therefore is within the terms of 24 & 25 Vict. c. 96, § 68. The words "by virtue of such employment," which were in the repealed statutes relating to the same offence, have been "advisedly omitted in order to enlarge the enactment and get rid of the decisions on the former enactments." Greaves' Crim. Law Consolidation Acts, p. 117.

[BOVILL, C. J. An alteration caused by the decision of Rex *v.* Snowley, 4 C. & P. 390, which was a case resembling the present one.

BLACKBURN, J. How can the money here be said to have been received into the possession of the servant so as to become the property of the master?]

The prisoner was exclusively employed by the prosecutor. With his master's barge he earned, and in the capacity of servant received, £4 as freight, which on receipt by him at once became the property of his master. Rex *v.* Hartley, Russ. & Ry. 139.

[BLACKBURN, J. But in this case the servant was disobeying orders. Suppose a private coachman used his master's carriage without leave, and earned half-a-crown by driving a stranger, would the money be received for the master so as to become the property of the latter?]

Such coachman has no authority to receive any money for his master; the prisoner, however, was entitled to take freight.

[BOVILL, C. J. He was expressly forbidden to do so on this occasion.]

Can it be said that he may be guilty of embezzlement if in obedience of orders he receives money, and yet not guilty of that crime if he is acting contrary to his master's commands? See note to Regina *v.* Harris, Dears. C. C. 344, in 2 Russell on Crimes, 4th ed., p. 453.

[BLACKBURN, J. In suggesting that case to be erroneous the editor seems to assume that the decision proceeded on the words "by virtue of his employment," whereas it did not.

BRAMWELL, B. Suppose the captain of a barge let his master's vessel as a stand to the spectators of a boat-race and took payment from them for the use of it?]

Such use would not be in the nature of his business.

[BLACKBURN, J. In the note to this section by Mr. Greaves he remarks: "Mr. Davis (Davis' Criminal Statutes, p. 70), rightly says that 'this omission avoids this technical distinction;' but he adds, 'still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretences.' This is plainly incorrect." But in my opinion Mr. Davis was plainly correct and Mr. Greaves wrong. Regina *v.* Thorpe, Dears. & B. C. C. 562.]

Bovill, C. J. In the former act relating to this offence were the words "by virtue of his employment." The phrase led to some difficulty; for example, such as arose in Regina *v.* Snowley, 4 C. & P. 390, and Regina *v.* Harris, Dears. C. C. 344. Therefore in the present statute those words are left out, and § 68 requires instead that in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to or received or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's orders, used the barge for his, the servant's, own purposes, and so earned money which was paid to him, not for his master but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property and so earning money for himself and not for his master. Under those circumstances the money would not be received "for" or "in the name of" or "on account of" his master but for himself, in his own name, and for his own account. His act therefore does not come within the terms of the statute, and the conviction must be quashed.

Bramwell, B. I am of the same opinion. I think in these cases we should look at the substance of the charge and not merely see whether the case is brought within the bare words of the Act of Parliament. Now the wrong committed by the prisoner was not fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel. The offence is, as I pointed out during argument, only that which a barge-owner's servant might be guilty of, if when navigating the barge, he stopped it, allowed persons to stand upon it to view a passing boat-race, charged them for so doing, and pocketed the money they paid to him. There is no distinction between that case and this save that the supposititious case is more evidently out of the limits of the statute.

The use of this barge by the prisoner was a wrongful act yet not dishonest in the sense of stealing. But I will add that I do not think this case even within the words of the statute. The servant undoubtedly did not receive the money "for" his master nor "on account of" his master nor "in the name" of his master. Nevertheless I doubt extremely whether on some future day great difficulty may not arise as to the meaning of these expressions in § 68, for I doubt whether, although the servant had used his master's name, he would have been within the terms of the Act of Parliament. "In the name of" his master is a very curious expression. Suppose a person in service as a carter had also a horse and cart of his own and employed them to do some or other work, professing them to be his master's, and received hire for it "in the name of" his master, would that be embezzlement? Could he be rightly convicted under this section? I doubt it extremely. The words "in the name of" his master, although inserted with a desire to obviate difficulties, seem to me likely hereafter to raise them.[1]

REGINA v. BARNES.

DEVIZES ASSIZES. 1858.

[*Reported* 8 *Cox C. C.* 129.]

Prisoner was indicted for that he being the servant of Joseph Hill and others, did embezzle two sums of £68 10*s*., and £29 9*s*. 7*d*., their property.

Edlin, for the prosecution.

Cole, for the prisoner.

It was proved that prisoner, who was a coal and timber merchant, fell into difficulties, and made an assignment of all his goods, effects, and book debts. After the execution of this assignment, he received the two sums of money in question, which had been debts previously due to him, and he had not accounted for the receipt of those sums. After the execution of the deed the prisoner had been employed by the trustees, at a salary, to conduct the business for the benefit of the trustees.

Cole submitted that the debts being only choses in action could not be assigned in law, they could only be sued for and recovered in the prisoner's name; and in law he was the person entitled to receive them; in fact, he received his own money.

Edlin contended that immediately on the receipt of the money by the prisoner it became the property of the trustees, and then the prisoner was guilty of embezzlement.

Cole, in reply. Embezzlement is the stopping of money *in transitu* to the employer. If rightly received by the prisoner, the keeping of it afterwards was not embezzlement. He could not be guilty of larceny unless the money was ear-marked, and if ear-marked, it was the debt supposed to be assigned, but which had not passed in law, only in equity.

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[1] Concurring opinions of Blackburn and Archibald, JJ., are omitted. See *acc.* Reg. *v.* Harris, 6 Cox C. C. 363; Reg. *v.* Read, 3 Q. B. D. 131; Brady *v.* State, 21 Tex. App. 659. See *ex parte* Hedley, 31 Cal. 108. — Ed.

Byles, J., said, the difficulty was to make out that, in point of law, the prisoner was a clerk, or servant, or acting in the capacity of a servant within the meaning of the statute. It was clear that these debts were not assignable in law; they were choses in action, and the deed would only bind him in equity. The moment he received these moneys, they were his own moneys, — he received what, in point of law, was his own money. How then, could he be guilty of embezzlement; or how could he be said to be clerk or servant to the trustees? He could not, in point of law, pass the property in the debts due to him before the deed was executed. His assignees were only equitable assignees; they could only sue in his name. The deed could only pass that which he actually had in his possession at the time the deed was executed. Under these circumstances the indictment could not be sustained.

The prisoner was, therefore, *acquitted.*

COMMONWEALTH *v.* HAYS.

Supreme Judicial Court of Massachusetts. 1858.

[*Reported* 14 *Gray*, 62.]

Indictment on St. 1857, c. 233, which declares that "if any person, to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle, or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny." The indictment contained two counts, one for embezzlement, and one for simple larceny.

At the trial in the Court of Common Pleas in Middlesex, at October term, 1858, before Aiken, J., Amos Stone, called as a witness by the Commonwealth, testified as follows: "I am treasurer of the Charlestown Five Cent Savings Bank. On the 17th day of October, 1857, the defendant came into the bank, and asked to draw his deposit, and presented his deposit book. I took his book, balanced it, and handed it back to him. It was for one hundred and thirty dollars in one item. I then counted out to him two hundred and thirty dollars, and said, 'There are two hundred and thirty dollars.' The defendant took the money to the end of the counter, and counted it, and then left the room. Soon after the defendant had left, I discovered that I had paid him one hundred dollars too much. After the close of bank hours I went in search of the defendant, and told him that I had paid him one hundred dollars too much, and asked him to adjust the matter. The defendant asked me how I knew it. He asked me if I could read. I said 'Yes.'

He then showed me his book, and said, 'What does that say?' I took it, and read in it one hundred and thirty dollars. The defendant then said, 'That is what I got.' He exhibited two fifties, two tens, and a ten dollar gold piece, and said, 'That is what I got.' I then said to him, 'Do you say that is all and precisely what I gave you?' He replied, 'That is what I got.' I then said to him, 'I can prove that you got two hundred and thirty dollars.' He replied, 'That is what I want; if you can prove it, you will get it; otherwise, you wont.' I intended to pay the defendant the sum of two hundred and thirty dollars, and did so pay him. I then supposed that the book called for two hundred and thirty dollars. Books are kept at the bank, containing an account with depositors, wherein all sums deposited are credited to them, and all sums paid out are charged to them."

The defendant asked the court to instruct the jury that the above facts did not establish such a delivery or embezzlement as subjected the defendant to a prosecution under the St. of 1857, c. 233, and did not constitute the crime of larceny.

The court refused so to instruct the jury; and instructed them "that if the sum of two hundred and thirty dollars was so delivered to the defendant, as testified, and one hundred dollars, parcel of the same, was so delivered by mistake of the treasurer, as testified, and the defendant knew that it was so delivered by mistake, and knew he was not entitled to it, and afterwards the money so delivered by mistake was demanded of him by the treasurer, and the defendant, having such knowledge, did fraudulently, and with a felonious intent to deprive the bank of the money, convert the same to his own use, he would be liable under this indictment." The jury returned a verdict of guilty, and the defendant alleged exceptions.

N. St. J. Green, for the defendant.

S. H. Phillips (Attorney General), for the Commonwealth.

BIGELOW, J. The statute under which this indictment is found is certainly expressed in very general terms, which leave room for doubt as to its true construction. But interpreting its language according to the subject matter to which it relates, and in the light of the existing state of the law, which the statute was intended to alter and enlarge, we think its true meaning can be readily ascertained.

The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. The King *v.* Bazeley, 2 Leach (4th ed.), 835; 2 East P. C. 568.

The statutes relating to embezzlement were intended to embrace this class of offences; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist. This is the distinguishing feature of the provisions in the Rev. Sts. c. 126, §§ 27–30, creating and punishing the crime of embezzlement, which carefully enumerate the classes of persons that may be subject to the penalties therein provided. Those provisions have been strictly construed, and the operation of the statute has been carefully confined to persons having in their possession, by virtue of their occupation or employment, the money or property of another, which has been fraudulently converted in violation of a trust reposed in them. Commonwealth *v.* Stearns, 2 Met. 343; Commonwealth *v.* Libbey, 11 Met. 64; Commonwealth *v.* Williams, 3 Gray, 461. In the last named case it was held, that a person was not guilty of embezzlement, under Rev. Sts. c. 126, § 30, who had converted to his own use money which had been delivered to him by another for safe keeping.

The St. of 1857, c. 233, was probably enacted to supply the defect which was shown to exist in the criminal law by this decision, and was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted by him. But in this class of cases there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid or property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offence of embezzlement, and we cannot think that the legislature intended to place them on the same footing. We are therefore of opinion that the facts proved in this case did not bring it within the statute, and that the defendant was wrongly convicted. *Exceptions sustained.*[1]

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[1] See Reg. *v.* Robson, 9 Cox C. C. 29. — ED.

COMMONWEALTH *v.* BERRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported* 99 *Massachusetts*, 428.]

HOAR, J.[1] The bill of exceptions states that this indictment was found under Gen. Sts. c. 161, § 41. It seems to be a good indictment under that section, or under § 35 of the same chapter. Commonwealth *v.* Concannon, 5 Allen, 506; Commonwealth *v.* Williams, 3 Gray, 461. But the more important question is, whether, upon the facts reported, an indictment can be sustained for the crime of embezzlement. The statutes creating that crime were all devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person, by whom it was converted to his own use, in such a manner that the possession of the owner was not violated, so that he could not be convicted of larceny for appropriating it. Proof of embezzlement will not sustain a charge of larceny. Commonwealth *v.* Simpson, 9 Met. 138; Commonwealth *v.* King, 9 Cush. 284. In the case last cited, it is said by Mr. Justice Dewey that "the offences are by us considered so far distinct as to require them to be charged in such terms as will indicate the precise offence intended to be charged." "If the goods are not in the actual or constructive possession of the master, at the time they are taken, the offence of the servant will be embezzlement, and not larceny." We see no reason why the converse of the proposition is not true, that, if the property is in the actual or constructive possession of the master at the time it is taken, the offence will be larceny, and not embezzlement. And it has been so held in England. Where the prisoner was the clerk of A., and received money from the hands of another clerk of A. to pay for an advertisement, and kept part of the money, falsely representing that the advertisement had cost more than it had; it was held that this was larceny and not embezzlement, because A. had had possession of the money by the hands of the other clerk. Rex *v.* Murray, 1 Mood. 276; s. c. 5 C. & P. 145. The distinction is between custody and possession. A servant who receives from his master goods or money to use for a specific purpose has the custody of them, but the possession remains in the master.

The St. 14 & 15 Vict. c. 100, § 13, provided that whenever, on the trial of an indictment for embezzlement, it should be proved that the taking amounted to larceny, there should not be an acquittal, but a conviction might be had for larceny. We have no similar statute in this Commonwealth.

In the present case, the defendant, who was employed as a servant, was directed by one member of the firm who employed him to take a sum of money from him to another member of the firm. He had the custody of the money, but not any legal or separate possession of it. The possession remained in his master. His fraudulent and felonious appropriation of it was therefore larceny, and not embezzlement. Commonwealth *v.* O'Malley, 97 Mass. 584; Commonwealth *v.* Hays, 14 Gray, 62; People *v.* Call, 1 Denio, 120; United States *v.* Clew, 4 Wash. C. C. 702.

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[1] The opinion only is given, it sufficiently states the case

In People *v.* Hennessey, 15 Wend. 147, cited for the Commonwealth, the money embezzled by the defendant had never come into the possession of his master. And in People *v.* Dalton, 15 Wend. 581, the possession of the defendant was that of a bailee.

Exceptions sustained.[1]

COMMONWEALTH *v.* FOSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[*Reported* 107 *Massachusetts*, 221.]

INDICTMENT for embezzlement, found at July term, 1870, of the Superior Court in Suffolk.

At the trial, before Wilkinson, J., John Langley testified that about May 13, 1870, being in need of money, he made two promissory notes payable to his own order and indorsed by himself, payable in four and six months respectively, for $1250 each, and delivered them to the defendant upon the special agreement of the defendant to sell the notes and deliver the proceeds to Nathan A. Langley, a brother of the witness, charging a commission for his services; that at the same time, and as a part of the transaction, the defendant gave to the witness, as receipts, the defendant's own notes of the same tenor and date as those delivered to him by the witness, which were deposited by the witness with his brother, to be by him given up to the defendant when the latter should deliver the proceeds of the witness's notes in pursuance of the agreement before stated; and that he did not know whether the defendant was a broker or not, and did not deal with him as such.

It further appeared that the defendant sold the notes of John Langley to one Wilson for $1000 in cash, and a mortgage on real estate valued at $1000; and that he had not delivered any part of the proceeds to John Langley or his brother, but, when asked for them by the former, replied that he had used them and was unable to deliver them. It did not appear that John Langley or his brother had tendered to the defendant the notes given by him.

Upon the close of the evidence for the Commonwealth, the defendant demurred thereto, as insufficient to support a verdict of guilty; but the judge overruled the demurrer. The defendant then testified that he was a real estate broker; and that he negotiated the notes in the manner testified to by John Langley, and used the money, partly in business as a provision dealer, in which he was also engaged at the time, and partly in paying his debts.

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[1] *Acc.* Rex *v.* Sullens, 1 Moo. C. C. 129; Reg. *v.* Masters, 3 Cox C. C. 178. — ED.

The judge thereupon instructed the jury "that it was a question of fact, for them to decide upon the evidence, whether John Langley employed the defendant as a broker; that if the defendant was employed merely to sell the notes, receive the proceeds and pay over the same specifically to the brother, without any authority to mix them with his own funds, a fraudulent conversion of them would be embezzlement; but that if he was employed as a broker, to negotiate the notes in the course of his business, with authority, derived from the nature of that business or otherwise, to mix the proceeds as aforesaid, his use of them would not be embezzlement." The jury returned a verdict of guilty, and the defendant alleged exceptions.

C. R. Train, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

By the Court. Under the instructions given them, the jury must have found that the defendant was an agent within the statute, and embezzled his employer's money. The notes given by him appear to have been given to answer the purpose of receipts, and not for the purpose of transferring to him any property in the notes received by him, or the money received by him on the sale of the notes. Commonwealth *v.* Stearns, 2 Met. 343; Commonwealth *v.* Libbey, 11 Met. 64. *Exceptions overruled.*[1]

PEOPLE *v.* HURST.

Supreme Court of Michigan. 1886.

[*Reported* 62 *Michigan*, 276.]

Campbell, C. J. Respondent was convicted of embezzling $275, alleged to have been put in his hands by one Lena J. Smith as her agent. Respondent was a lawyer, and also engaged more or less in renting houses. Mrs. Smith formed his acquaintance while seeking to rent a house. She got him to lend $400 for her, which he did on mortgage. She further said she had $1,100 more to lend. He said he had a place for $700, which he actually lent on first mortgage. He also showed her a letter from a man who had a parcel of forty acres of land to sell, and he wanted her to give him the money to buy it, as he knew of a purchaser who would buy at an advance. She handed him $400 to buy the land, and said he might have the profit. He told her where the land was, but she could not remember, and did not testify upon that point. This was on March 31, 1882. The embezzlement is charged as of that day.

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[1] See Mulford *v.* People, 139 Ill. 586. — Ed.

About the middle of April she saw him at his house, intoxicated. She asked him for her papers, and if he had invested the money, and he shook his head, and said he had been "on a drunk." She asked for her money, and he gave her $100, and a chattel mortgage which he owned for $25. She asked him if that was all he had, and he said it was, and promised to pay the balance in a month or two, and asked her to wait on him. She called on him frequently, and in the fall he conveyed to her forty acres of land in Cheboygan County as security until he could pay her. He said he was selling some land for a lady in Springwells; and, if he succeeded, his commissions would exceed his debt to her, and he would pay her, and she could return the deed, which she need not record, but he would pay for recording. She agreed to wait on him, and hold the deed as security a little longer, until he could sell the twenty-five acres referred to. She subsequently dunned him frequently, and, finding he had an interest in a patent right, asked him to assign that to her as security, which he did.

There was some other testimony which was material, in favor of defendant, on which his counsel made some points, which we do not now think it necessary to decide.

In our opinion, the testimony did not make out a case of embezzlement. Before that offence can be made out, it must distinctly appear that the respondent has acted with a felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over is not enough if that intent is not plainly apparent. This was decided in People *v.* Galland, 55 Mich. 628. See also Reg. *v.* Norman, 1 C. & M. 501; Reg. *v.* Creed, 1 C. & K. 63; Rex *v.* Hodgson, 3 C. & P. 422; 2 Russ. Cr. 182; 2 Bish. Crim. Law, §§ 376, 377.

In this case there was nothing indicating concealment or a felonious disposition. A candid admission was made at once on inquiry, and partial payment was made and security given at different times, when asked. The debt was admitted and recognized as a debt on both sides. Whatever wrong may have been done, there was no embezzlement proven.

The conviction must be quashed, and the court below advised to discharge the prisoner.

The other justices concurred.[1]

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[1] *Acc.* People *v.* Wadsworth, 63 Mich. 500. — ED.

CHAPTER X.

OBTAINING PROPERTY BY FALSE PRETENCES.

SECTION I.

The Question of Title.

REGINA v. KILHAM.

CROWN CASE RESERVED. 1870.

[*Reported Law Reports*, 1 *Crown Cases Reserved*, 261.]

CASE stated by the Recorder of York.

Indictment under 24 & 25 Vict. c. 96, § 88, for obtaining goods by false pretences.

The prisoner was tried at the last Easter Quarter Sessions for York. The prisoner, on the 19th of March last, called at the livery stables of Messrs. Thackray, who let out horses for hire, and stated that he was sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley, who was a customer of the Messrs. Thackray. Accordingly, the next morning the prisoner called for the horse, which was delivered to him by the hostler. The prisoner was seen, in the course of the same day, driving the horse, which he returned to Messrs. Thackray's stables in the evening. The hire for the horse, amounting to 7*s*., was never paid by the prisoner.

The prisoner was found guilty.

The question was, whether the prisoner could properly be found guilty of obtaining a chattel by false pretences within the meaning of 24 & 25 Vict. c. 96, § 88.

The case of Regina *v.* Boulton, 1 Den. C. C. 508, was relied on on the part of the prosecution.

The case was argued before Bovill, C. J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

May 7. No counsel appeared for the prisoner.

Simpson, for the prosecution.[1]

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[1] The argument is omitted.

Bovill, C. J. We are of opinion that the conviction in this case cannot be supported. The Stat. 24 & 25 Vict. c. 96, § 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanor." The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, etc. This is, to some extent, indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made more clear by referring to the earlier statute from which the language of § 88 is adopted. 7 & 8 G. IV. c. 29, § 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud,'" and for remedy thereof enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: That if a person by fraud induced another to part with the possession only of goods and converted them to his own use, this was larceny; while if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny.

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of Regina *v.* Boulton was referred to. There the prisoner was indicted for obtaining by false pretences a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect, — that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time. The conviction must therefore be quashed.

Conviction quashed.[1]

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[1] See Reg. *v.* Watson, 7 Cox C. C. 364. — Ed.

REX *v.* ADAMS.

Crown Case Reserved. 1812.

[*Reported Russell & Ryan*, 225.]

The prisoner was tried before Mr. Justice Chambre, at the Lent Assizes held at Taunton, in the year 1812, for a grand larceny in stealing a hat, stated in one count to be the property of Robert Beer and in another count to be the property of John Paul.

The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat-maker at Ilminster. That on the 18th of January he called for it, and was told it would be got ready for him in half an hour, but he could not have it without paying for it.

While he remained with Beer, Beer showed him a hat which he had made for one John Paul; the prisoner said he lived next door to him, and asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. He then went away, saying he would send his brother's wife for his own hat.

Soon after he went he met a boy to whom he was not known. The prisoner asked the boy if he was going to Ilminster, and being told that he was going thither, he asked him if he knew Robert Beer there, telling him that John Paul had sent him to Beer's for his hat, but added that as he, the prisoner, owed Beer for a hat which he had not money to pay for, he did not like to go himself, and therefore desired the boy (promising him something for his trouble) to take the message from Paul and bring Paul's hat to him the prisoner; he also told him that Paul himself, whom he described by his person and a peculiarity of dress, might perhaps be at Beer's, and if he was the boy was not to go in.

The prisoner accompanied him part of the way, and then the boy proceeded to Beer's, where he delivered his message and received the hat, and after carrying it part of the way for the prisoner by his desire, the prisoner received it from him, saying he would take it himself to Paul.

The fraud was discovered on Paul's calling for his hat at Beer's, about half an hour after the boy had left the place; and the prisoner was found with the hat in his possession and apprehended.

From these and other circumstances, the falsity of the prisoner's representation and his fraudulent purpose were sufficiently established; but it was objected on the part of the prisoner that the offence was not larceny, and that the indictment should have been upon the statute for obtaining goods by false pretences.

The prisoner was convicted, but the learned judge forbore to pass sentence, reserving the question for the opinion of the judges.

In Easter term, 25th of April, 1812, all the judges were present (except Lord Ellenborough, Mansfield, C. J., and Lawrence, J.), when they held that the conviction was wrong; that it was not larceny, but obtaining goods under a false pretence.[1]

SECTION II.

Property.

REGINA *v.* ROBINSON.

CROWN CASE RESERVED. 1859.

[*Reported Bell C. C.* 34.]

THE following case was reserved by the Recorder of Liverpool.

The prosecutor, who resided at Hartlepool, was the owner of two dogs, which he advertised for sale. The prisoner, Samuel Robinson, having seen the advertisement, made application to the prosecutor to have the dogs sent to him at Liverpool on trial, falsely pretending that he was a person who kept a man-servant. By this pretence the prosecutor was induced to send the dogs to Liverpool, and the prisoner there obtained possession of them with intent to defraud, and sold them for his own benefit. The dogs were Pointers, useful for the pursuit of game, and of the value of £5 each.

At the Liverpool Borough Sessions, holden in December, 1858, the prisoner was indicted, convicted, and sentenced to seven years penal servitude, under the statute 7 & 8 G. IV. c. 29, s. 53.

On behalf of the prisoner a question was reserved and is now submitted for the consideration of the justices of either bench and barons of the Exchequer, viz., whether the said dogs were chattels within the meaning of the said section of the statute, and whether the prisoner was rightly convicted.

The prisoner remains in Liverpool Borough Gaol under the sentence passed at Sessions.

GILBERT HENDERSON,
Recorder of Liverpool.

This case was argued, on January 29, 1859, before Lord Campbell, C. J., Martin B., Crowder, J., Willes, J., and Watson, B.

Brett appeared for the Crown, and *Littler* for the prisoner.[2]

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[1] *Acc.* Reg. *v.* Butcher, 8 Cox C. C. 77; People *v.* Johnson, 12 Johns. 292. And see Com. *v.* Jeffries, 7 All. 548. See the judgment of Cleasby, B., in Reg. *v.* Middleton, L. R. 2 C. C. 38, *ante.* As to the title to property obtained by false pretences, see Lindsay *v.* Cundy, 1 Q. B. D. 348, 2 Q. B. D. 96, 3 App. Cas. 459; Bentley *v.* Vilmont, 12 App. Cas. 471. — ED.

[2] Arguments of counsel are omitted.

LORD CAMPBELL, C. J. It is admitted that dog-stealing is not larceny at common law, and a specific punishment of a milder character has been enacted by the later statute, which makes the offence a misdemeanor. That being so, it would be monstrous to say that obtaining a dog by false pretences comes within the statute 7 & 8 G. IV. c. 29, s. 53, by which the offender is liable to seven years penal servitude. My brother Coleridge used to say that no indictment would lie under that section unless, if the facts justified it, the prisoner could be indicted for larceny, and that is now my opinion.

MARTIN, B. I think this conviction cannot be sustained. The question is one entirely of the construction of the statute.

WILLES, J. From the Year Books downwards, including the case of Swans, 7 Rep. 15 *b*, dogs have always been held not to be the subject of larceny at common law.

The other learned judges concurred.

Conviction quashed.[1]

PEOPLE *v.* THOMAS.

SUPREME COURT OF NEW YORK. 1842.

[*Reported* 3 *Hill*, 169.]

CERTIORARI to the Oneida General Sessions, where Thomas was convicted of obtaining money by false pretences, of one Jones. The case turned upon the sufficiency of the indictment, which charged substantially the following facts: Jones, having executed his negotiable note to Thomas for $28.28, dated the 19th of February, 1838, and payable one day after date, the latter, in March afterward, called for payment, falsely pretending to Jones that the note had either been lost or burned up; by which false pretences Thomas unlawfully, etc., obtained from Jones the sum of $28.28, with intent to cheat and defraud Jones; whereas in truth, etc., the note had not been lost or burned up, all which the said Thomas, when he made the false pretence and obtained the money, well knew, etc.

Evidence was given, at the trial, of the above facts; and also, that in March, 1840, Thomas negotiated the note, for value, to one Anson Shove, without apprizing the latter that it had been paid. The court below instructed the jury that the proof was sufficient to convict; to which the defendant's counsel excepted. A verdict was rendered, finding the defendant guilty.

C. Tracy, for the defendant.

T. Jenkins (district attorney), *contra*.

PER CURIAM. *Non constat* from the indictment, that Jones sustained any damage by the false representation; nor that there was an intent on the part of Thomas, at the time of the representation, to work any damage. The note was due; and payment made. This was the only consequence — a thing which Jones was bound to do. A false representation, by which a man may be cheated into his duty, is not within the statute. It was said in argument that the subsequent negotiation of the note by Thomas obviated the difficulties adverted to. The note being over due when the latter fact took place, it is difficult to see judicially, that Jones would be injured by it. Whether he would or would not, is merely speculative, depending on his precaution in providing himself with proper evidence. It is enough, however, to say that the indictment does not charge the subsequent act of negotiation as entering into the defendant's design when he made the representation; nor is the act itself even mentioned.

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[1] *Acc.* State *v.* Barrows, 11 Ire. 477. — ED.

New trial ordered.[1]

STATE *v.* BLACK.

SUPREME COURT OF WISCONSIN. 1890.

[*Reported* 75 *Wisconsin*, 490.]

CASSODAY, J.[2] Sec. 4423, R. S., punishes the obtaining of property or a signature under the circumstances therein mentioned. The question here presented relates entirely to the obtaining of property. So much of that section as pertains to that question reads: "Any person who shall *designedly*, by any *false pretense*, or by any privy or false token, *and with intent to defraud*, *obtain* from any other person any money, goods, wares, merchandise, or other property, . . . shall be punished," etc. To sustain a conviction under this section four things must concur. It sufficiently appears from the record that three of those things co-existed in the case at bar, — that is to say it sufficiently appears that the defendant (1) "designedly," (2) by means of the false pretense mentioned, (3) "and with intent to defraud," obtained the board and lodging mentioned. The only question, therefore, requiring consideration here is whether the obtaining of such board and lodging was, in legal effect, the obtaining of "money, goods, wares, merchandise, *or other property*," within the meaning of the section.

From the very wording of the statute it is manifest that no complete offense can be committed under it until the "money, goods, wares, merchandise, or other property," is actually obtained by the offender. This being so, it is equally obvious that if the statute applies to the obtaining of board and lodging, then each meal of board obtained constitutes a separate offense; and the same would be true of each night's lodging. If the section applies to board and lodging, then, for the same reason, it would apply to almost any service or use. Another serious difficulty with such application in the case at bar is the absence from the record of any certain and definite description of the property actually obtained. Many of the authorities hold that in the information or indictment in such cases, "the property should be described with as much accuracy and particularity as in indictments for larceny." State *v.* Kube, 20 Wis. 225; s. c. 91 Am. Dec. 395. Where the description of the property is uncertain, the defect is fatal. Ibid. We are to remember that it is a criminal statute we are construing. It should not be so construed as to multiply crimes, unless required by the context. The word "property" is, in many cases, construed to include "things in action and evidences of debt." Subd. 3, 4, sec. 4972, R. S. But the words "other property," in the statute quoted, must, under the familiar rule, *noscitur a sociis*, be limited to such tangible classes of property as are therein previously enumerated; that is to say, "money, goods, wares, merchandise, and other property" of that description. This rule has frequently been applied by this court, especially to penal statutes. Jensen *v.* State, 60 Wis. 582, and cases there cited. See, also, Gibson *v.* Gibson, 43 Wis. 33; Estate of Kirkendall, 43 Wis. 179; Kelley *v.* Madison, 43 Wis. 645.

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[1] *Acc. In re* Cameron, 44 Kas. 64; Com. *v.* McDuffy, 126 Mass. 467. — ED.

[2] The opinion only is given; it sufficiently states the case.

The principle governing the case at bar is somewhat similar to that involved in People *v.* Haynes, 14 Wend. 546; s. c. 28 Am. Dec. 530. In that case merchandise was purchased, and placed by the seller in a box, marked with the buyer's name and address, and delivered to the carrier named by the purchaser, to be delivered at his residence; but the seller, before delivering the shipper's receipt and invoice, having learned that the purchaser was embarrassed, asked him in regard thereto, whereupon the buyer made false and fraudulent representations as to his condition, and, in consequence thereof, the seller delivered to the buyer the shipper's receipt and invoice, and did not stop the goods *in transitu;* and it was held that the buyer was not criminally liable for obtaining the goods by false pretenses, since the goods were in law obtained when they were delivered to the carrier, which was before the false pretenses were made.

The construction of the statute indicated has additional force from the fact that the same section punishes the obtaining by false pretenses of a signature to a written instrument, the false making whereof would be punishable as forgery. Sec. 4423, R. S. This clearly covers some "things in action and evidences of debt," and by necessary implication excludes others, as, for instance, a mere credit, as here. We must hold that the words "or other property" do not include the mere obtaining of board and lodging under the circumstances stated.

The result is that the first question propounded is answered in the negative. This renders it unnecessary to answer the second question

By the COURT. *Ordered accordingly.*[1]

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[1] *Acc.* Reg. *v.* Gardner, 7 Cox C. C. 136. — ED.

SECTION III.

The Pretence.

REX *v.* GOODHALL.

CROWN CASE RESERVED. 1821.

[*Reported Russell & Ryan,* 461.]

THE prisoner was tried before Mr. Baron Garrow, at the Stafford summer Assizes, in the year 1821, on an indictment, charging that he, being an ill-designing person, and a common cheat, and intending to cheat and defraud one Thomas Perks, of his goods, wares, and merchandizes, on the 17th of August, 1821, at the parish of Wolverhampton; unlawfully, knowingly, and designedly, did falsely pretend that if he, the said Thomas Perks, would sell to him, the prisoner, the carcases of three sheep and two legs of veal, and send the same to him at Blonwick, he, the said prisoner, would pay for the same on delivery, and send the money back by the servant of the said Thomas Perks; by which said false pretences, he, the said prisoner, did obtain from the said Thomas Perks two hundred and twenty pounds weight of mutton, value £4, and thirty pounds weight of veal, value 10*s.*, his property, with intent to cheat him of the same. Whereas, in truth and in fact, the said prisoner did not, at the time of buying the said carcases and legs of veal, intend to pay for the same on delivery. And whereas, in truth and in fact, the said prisoner did not pay for the same on delivery. And whereas, in truth and in fact, the said prisoner did not send the money for the same back by the servant of him the said Thomas Perks, against the form of the statute, &c.

It appeared in evidence, that the prosecutor, Thomas Perks, was a butcher at Wolverhampton; and that, on the 17th of August, 1821, the prisoner came to his shop to purchase three sheep and two legs of veal; on being told by the prosecutor that he would not trust him, he promised the prosecutor, if he would send the sheep and veal in good time on the following morning, he would remit the money back by the bearer.

The meat was accordingly sent on the 18th of August, by the prosecutor, and delivered to the prisoner by the prosecutor's servant, who asked him for the money; and said, if he did not give it him, he must take the meat back again. The prisoner replied, "Aye, sure!" and wrote a note; and told the prosecutor's servant to take it to his master, and it would satisfy him. The note (of which the following is a copy) was delivered to the prosecutor by his servant: —

"Mr. Perks, Sir, I have a bill of Walsall bank, which is a very good one, if you will send me the change, or I'll see you on Wednesday certain." "Your's, M. G."

The jury found the prisoner guilty; and said they were of opinion, that at the time the prisoner applied to Perks, he knew Perks would not part with the meat without the money; and that he promised to send back the money to obtain the goods. The jury also found, that at the time he applied for the meat, and promised to send back the money, he did not intend to return the money; but by that means to obtain the meat, and cheat the prosecutor.

The learned judge respited the judgment, making an order that the prisoner might be delivered, on finding bail, to appear at the then next Assizes.

In Michaelmas term, 1821, the judges met and considered this case. They held the conviction wrong; being of opinion, that was not a pretence within the meaning of the statute. It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it.[1]

REX v. WAKELING.

CROWN CASE RESERVED. 1823.

[*Reported Russell & Ryan*, 504.]

THE prisoner was convicted before Mr. Justice Bayley, at the gaol delivery for the county of Essex, in January, 1823, for obtaining a pair of shoes from Thomas Poole, the overseer of the poor of the parish of Great Wheltham, from which parish the prisoner received parochial relief, by falsely pretending that he could not go to work because he had no shoes, when he had really a sufficient pair of shoes.

It appeared in evidence that the prisoner and his family received relief from the parish; that Poole, the overseer, bid the prisoner go to work to help to maintain his family; that the prisoner said he could not because he had no shoes; that Poole, the overseer, thereupon supplied him with a pair of the value of ten shillings, and that the prisoner had, in fact, at the time, two pair of new shoes, which he had previously received from the parish.

The learned judge doubted whether this was a case within the statute, and thought it right to lay it before the judges for their consideration.

In Hilary term, 1823, this case was considered by the judges, who held that it was not within the act, and that the conviction was wrong; the statement made by the prisoner being rather a false excuse for not working than a false pretence to obtain goods.[2]

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[1] *Acc.* Reg. v. Lee, 9 Cox C. C. 304; State v. Colly, 39 La. Ann. 841; State v. De Lay, 93 Mo. 98. See Reg. v. Jones, 6 Cox C. C. 467; State v. Sarony, 95 Mo. 349. — ED.

[2] *Acc.* Reg. v. Stone, 1 F. & F. 311. — ED.

REX *v.* BARNARD.

OXFORD ASSIZES. 1837.

[*Reported* 7 *Carrington & Payne*, 784.]

FALSE pretences. The indictment charged that the prisoner falsely pretended that he was an under-graduate of the University of Oxford, and a commoner of Magdalen College, by means of which he obtained a pair of boot-straps from John Samuel Vincent.

It appeared that Mr. Vincent was a boot-maker, carrying on business in High Street, Oxford; and that the prisoner came there, wearing a commoner's cap and gown, and ordered boots, which were not supplied him, and straps, which were sent to him. He stated he belonged to Magdalen College.

It was proved by one of the butlers of Magdalen College that the prisoner did not belong to that college, and that there are no commoners at Magdalen College.

BOLLAND, B. (in summing up). If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence without any words being used.

Verdict, Guilty.[1]

REGINA *v.* MILLS.

CROWN CASE RESERVED. 1857.

[*Reported* 7 *Cox C. C.* 263.]

AT the General Quarter Sessions of the Peace holden for the county of Cambridge, on the 9th January, 1857, William Mills was tried and convicted upon the following indictment for obtaining money under false pretences.

The jurors for our Lady the Queen upon their oath present, that William Mills, on the 14th day of November, 1856, did falsely pretend to one Samuel Free that the said William Mills had cut sixty-three fans of chaff for him the said Samuel Free, by which said false pretence the said William Mills then unlawfully did obtain from the said Samuel Free certain money of him the said Samuel Free, with intent to defraud. Whereas, in truth and in fact, the said William Mills had not cut sixty-three fans of chaff, as the said William Mills did then so falsely pretend to the said Samuel Free, but a much smaller quantity, to wit, forty-five fans of chaff. And the said William Mills, at the time he so falsely pretended as aforesaid, well knew the said pretence to be false, against the form of the statute, &c. It appeared from the evidence that the prisoner was employed to cut chaff for the prosecutor, and was to be paid twopence per fan for as much as he cut. He made a demand for 10*s.* 6*d.*, and stated he had cut sixty-three fans, but the prosecutor and another witness had seen the prisoner remove eighteen fans of cut chaff from an adjoining chaff-house, and add them to the heap which he pretended he had cut, thus making the sixty-three fans for which he charged. Upon the representation that he had cut sixty-three fans of chaff, and notwithstanding his knowledge of the prisoner having added the eighteen fans, the prosecutor paid him the 10*s.* 6*d.*, being 3*s.* more than the prisoner was entitled to for the work actually performed. It was objected on behalf of the prisoner, first, that this was simply an overcharge, as in the case of R. *v.* Oates, 6 Cox Crim. Cas. 540; and secondly, that as the prosecutor at the time he parted with his money knew the facts, the prisoner could not be said to have obtained the money by the false pretence. Judgment was postponed, and the prisoner was discharged upon recognizances to appear at the next Quarter Sessions. The opinion of the Court of Criminal Appeal is requested whether the prisoner was rightly convicted of misdemeanor under the foregoing indictment.

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[1] *Acc.* Rex *v.* Douglass, 7 C. & P. 785 *n.*; Reg. *v.* Hunter, 10 Cox C. C. 642; Reg. *v.* Bull, 13 Cox C. C. 608; Reg. *v.* Sampson, 52 L. T. 772; Reg. *v.* Randell, 16 Cox C. C. 335.— ED.

No counsel was instructed for the prisoner.

Orridge, for the Crown. Although the prosecutor knew that the representation was false, and permitted the prisoner to complete the offence by receiving the money, that does not render the offence less in him. In larceny the same doctrine is established, R. *v.* Eggington, 2 B. & P. 508. [Cockburn, C. J. There the prosecutor remains passive. Willes, J. *Invito domino* is held to mean without leave.] In R. *v.* Adey, 7 C. & P. 140, it was said to be no answer that the prosecutor had laid a plan to entrap the prisoner into the commission of the offence.

Cockburn, C. J. The question in these cases is, whether the false representation is the immediate motive operating on the mind of the prosecutor, and inducing him to part with his money. It cannot be said that that was the case here, because he paid the money although he knew the representation to be false. Unless the money be obtained *by* the false pretence, it is an attempt only.

Coleridge, J. In R. *v.* Adey the prosecutor did part with his money in consequence of the false pretence.

Bramwell, B. I do not think he could recover back the money in a civil action.

Willes, J. Because it was paid voluntarily with a knowledge of all the circumstances. *Conviction quashed.*[1]

REGINA *v.* BRYAN.

Crown Case Reserved. 1857.

[*Reported* 7 *Cox C. C.* 312.]

The following case was reserved by the Recorder of London at the Central Criminal Court: —

It was partly argued before five of the learned judges on a former day, but on account of the importance of the question raised in this as well as in Reg. *v.* Sherwood, 7 Cox C. C. 270, they were both ordered to be reargued before all the judges.

CASE.

At the session of jail delivery holden for the jurisdiction of the Central Criminal Court on the second day of February, 1857, John Bryan was tried before me for obtaining money by false pretences. There were several false pretences charged in the different counts of the indictment, to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretences were, among others, charged: —

That certain spoons produced by the prisoner were of the best quality; that they were equal to Elkington's A (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A); that the foundation was of the best material; and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question, offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that had they known the real quality they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The money advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue, and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of "not guilty," which was resisted by the counsel for the prosecution, and entertaining doubts upon the question, I directed a verdict of guilty to be entered, in order that the judgment of the Court of Criminal Appeal might be taken in the matter, and the foregoing is the case on which that judgment is requested. RUSSELL GURNEY.

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[1] *Acc.* Reg. *v.* Jones, 15 Cox C. C. 475. See Reg. *v.* Hensler, 11 Cox C. C. 570. — Ed.

B. C. Robinson, for the prisoner, submitted that these were not false pretences within the statute. That the rule to be deduced from all the cases was this, that where the thing obtained was in specie that which it was represented to be, the statute applied; but where the falsehood was merely as to the quality of the thing, where it became a mere question of better or worse, such pretence was not indictable. Here the goods were in specie what they were represented to be; they were plated goods, but they were inferior in quality to the representation. If it were otherwise, and that the puffing or vaunting an article that was offered for sale was a criminal offence, every trader in the commercial world would be committing a crime twenty times in the course of each day. In R. *v.* Roebuck, 7 Cox Crim. Cas. 126, most of the learned judges in delivering their judgment stated that but for the case of R. *v.* Abbott, 1 Den. C. C. 173, they should have hesitated in holding the conviction to be proper, but that they felt bound by that authority. If then it could be shown that the present case, if the conviction were to be sustained, would go further than those above mentioned, the court would not confirm it. Every decision might be reconciled with the principle contended for. In R. *v.* Roebuck, the chain pawned for silver was not silver at all. So with regard to the thimble in R. *v.* Ball, C. & M. 249. In R. *v.* Dundas, 6 Cox Crim. Cas. 380, the article sold was stated to be Everett's blacking; it was bought on the faith of its being so, and it turned out to be a spurious compound. There it was not a mere representation of quality, but of a specific thing known as Everett's blacking.

LORD CAMPBELL. Was not R. *v.* Abbott decided on a pretence with regard to the quality of a cheese?

Robinson. No. If the representation alleged in the indictment had been that the cheese was of the same quality as the taster, that would have rendered the case analogous to this. But it was not so. The representation there was that the taster formed part and parcel of the cheese to be sold, and it was in truth of a totally different character, inserted into the bulk for the purposes of fraud. That was a statement of a specific fact quite independent of the quality. The cheese might have been of even better quality than the taster, and yet the falsehood of the pretence would equally exist. If the misrepresentation here had been that the spoons were of Elkington's manufacture, and had formed part of Elkington's stock, then the case would be identical with R. *v.* Abbott; but there is a wide distinction between the statements that they are Elkington's and that they are as good as Elkington's.

COLERIDGE, J. If the seller is to be indictable for overpraising his goods, then the buyer would be indictable also for unfairly depreciating them, and thus obtaining them below their value.

LORD CAMPBELL. That would certainly seem to be so. Even the act of depreciating would be indictable, because it would be an attempt to obtain them by a false pretence as to their quality.

Robinson. In the administration of the criminal law, it is of the highest importance to define as accurately as may be what crime is, and not to leave too much to the interpretation of juries. Otherwise, in such a case as this, every man who was dissatisfied with a bargain he had made would have it in his power to indict a tradesman who sold him goods, on the plea that every representation made in the course of the bargain was not true to the letter. A cutler who warranted a knife to be as good as Rodger's, a tailor who stated a coat to be of the best Saxony wool, a brewer who represented his beer to be treble X, would be constantly amenable to the criminal law, and a jury would have to decide upon their fate. A line must be drawn somewhere, and to hold that a pretence to be within the statute must be with reference to some clear specific fact, the truth or falsehood of which may be demonstrably shown, the assertion and the fact being each the contradictory of the other, is consistent both with convenience and authority, whilst it would be highly dangerous to hold that statements which might be mere matters of opinion or speculation were the subject-matters of a criminal charge.

LORD CAMPBELL. You say it is lawful to lie in respect of quality.

Robinson. However immoral, that it is not a crime. At the outset it must be admitted that this was a wilful lie. The case states it, and the jury have so found it. It must also be admitted that in consequence of the lie the money was obtained. It is only on such admissions that the point can ever arise. The question is, is such a lie as this a false pretence within the statute?

LORD CAMPBELL. But it is part of the allegation that there is as much silver in the spoons as in Elkington's A. Is not that the assertion of a fact?

Robinson. It is no more in reality than a representation of the quality. It is the amount of silver in these goods that gives them their value, and saying of them that they have more or less silver is equivalent to saying that they are of better or worse quality.

POLLOCK, C. B. Suppose a seller of cheese to state that it came from a particular dairy in Cheshire, when in fact it came from America.

Robinson. That might probably be a false pretence, because the buyer would not get the precise thing he bargained for. He might want a Cheshire cheese and not an American one, quite irrespective of the quality.

BRAMWELL, B. I see nothing in the statute that recognizes a distinction between species and quality.

Robinson. The statute must be taken in connection with the many cases that have been decided upon it, and which have given it a particular interpretation.

BRAMWELL, B. If I buy a spurious autograph of the Duke of Wellington, or a spurious picture attributed to Raphael, I get a thing of the same species as that bargained for.

Robinson. If the autograph or the picture was represented to be genuine when it was known to be spurious, that would probably be a false pretence; but if it was said that the writing or the painting was in the duke's or the painter's best style, and it was known to be otherwise, it would not be so. There are cases which tend to show that the doctrine of *caveat emptor* might be applicable here, or that false representations as to specific facts in the course of a bargain and sale are not within the statute, but still much doubt has of late been thrown upon them, and it is not thought necessary to rely upon them here.

Francis (with him *Metcalfe*), for the prosecution. The false pretences relied upon are as to the quantity of silver in the spoons being equal to Elkington's A, and the foundations being of the best material. These are facts easily ascertainable, and which, in truth, the jury have expressed their judgment upon. They are not mere statements that the spoons are as good or as valuable as Elkington's. It is something more than a mere representation with regard to quality; for it must be taken, after the finding of the jury, that the amount of silver on Elkington's A spoons was a well known fixed quantity. In the case of R. *v.* Sherwood, just decided, it was held that a misrepresentation with regard to quantity was a good false pretence within the statute, and there is here just as strong a representation as to quantity as there was there. The spoons, no doubt, had a small quantity of silver upon them, but it was so trifling that the money advanced exceeded their full value, and it is found that had the prosecutors known the real value they would not have advanced any money upon them whatever. But there is no case laying down the principle contended for on the other side, that a misrepresentation with regard to quality is not within the statute; on the contrary, in R. *v.* Kenrick, 5 Q. B. 49, one of the pretences was, that a horse was quiet to ride and drive, which was false within the seller's knowledge, and the court sustained the conviction. The words of the statute are clear and precise, that goods obtained by any false pretence constitutes the crime; and the jury have here found everything that the act renders material. It was probably intended to prevent precisely such frauds as these; and the argument that this is a mere vaunting or puffing off of goods that a tradesman is anxious to sell is answered by this, that the jury have found that the representations were made fraudulently and with intent to cheat the prosecutor. Where there is such an intent, and it is acted upon successfully, there can be no inconvenience in holding it to be punishable as a crime; and a jury of tradesmen would not be likely to convict a man who had merely exaggerated the value of his property for the purpose of getting a better price for it. That is often done innocently, or at least without any fraudulent intent; but here such limits are far overstepped. R. *v.* Roebuck virtually decides this case, for the pretences are substantially the same. It is true that there the chain which was represented to be silver was not silver at all; but here the representation is equally false, for although the spoons were coated with silver, it was in so small a quantity as to render them almost valueless. So in R. *v.* Abbott, whatever might be the pretence alleged in the indictment, in substance the fraud consisted in selling a very inferior article for one of superior quality.

Robinson, in reply. Whatever the representations may be, they have reference to quality, and not to species; and this, at all events, distinguishes the case from R. *v.* Roebuck, and all the other cases that have been decided upon this point. As to R. *v.* Kenrick the decision did not turn upon the pretence mentioned, namely, that the horses were quiet to ride and drive. There were other pretences in that case that would be clearly within the rule that the pretences had been made with respect to specific facts, and it was upon these that the court acted. In R. *v.* Sherwood there was a pretence that there were eighteen tons of coal to be delivered, when in truth there were only fourteen. There was therefore an assertion that there were four tons of coal in the wagon which did not exist at all. Here the number of spoons delivered was correctly represented, but each individual spoon was of an inferior description. In fact, the case states that it was the declaration of the prisoner with regard to the quality of the goods, and nothing else, which induced the prosecutors to part with their money.

On the conclusion of the argument, the learned judges retired to consider the case, and on their return they delivered the following judgments *seriatim*: —

LORD CAMPBELL, C. J. I am of opinion that this conviction cannot be supported, as it seems to me to proceed upon a mere representation, during the bargaining for the purchase of a commodity, of the quality of that commodity. In the last case which we disposed of (R. *v.* Sherwood), after the purchase had been completed there was a distinct averment which was known to be false, respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money was received than ought to have been received, the amount of which could be easily calculated; and therefore I thought, and I think now, that that was clearly a case within the Act of Parliament. But here, if you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article that was sold, bearing in mind that the article was of the species that it was represented to be to the purchaser, namely, plated spoons, and that the purchaser received them. Now, it seems to me, it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. It seems to me that this is an extension of the criminal law which is most alarming, for not only would sellers be liable to be indicted for an extravagant representation of the value of goods, but purchasers would be liable to be indicted if they improperly depreciated the quality of the goods, and induced the sellers by that depreciation to sell the goods at an under price, and below the real value of the goods, which would have been paid for them had it not been for that representation. Now, as yet, I find no case in which it has been held that this misrepresentation, at the time of sale, of the quality of the goods, has been held to be an indictable offence. In Reg. *v.* Roebuck the article delivered was not of the species bargained for, for there it was for a silver chain, and the chain that was sold was not of silver, but was of some base metal, and was of no value. But here the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me, therefore, that this is not a case within the Act of Parliament, and that the conviction cannot be supported.[1]

Pollock, C. B. There may be considerable difficulty in laying down any general rule which shall be applicable to each particular case, and although I think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller, yet I am not prepared to lay down this doctrine in an abstract form, because I am clearly of opinion that there might be many cases of buying and selling to which the statute would apply. I think if a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, there I think the statute would apply. So if a mart were opened, or a shop in a public street, with a view of defrauding the public, and puffing off articles calculated to catch the eye which really possessed no value, there I think the statute would apply; but I think it does not apply to the ordinary commercial dealings between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller, it equally applies to the purchaser. It is not very likely that many cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavoring to get the article cheap which he was bargaining for, and that if he was endeavoring to get it under the value he might be indicted for so doing. And there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offence, any attempt or step towards it is an indictable offence as a misdemeanor, because any attempt or any progress made towards the completion of the offence would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and cheapen an article but he would subject himself to an indictment for misdemeanor in endeavoring to get the article under false pretences. For these reasons I think it may be fairly laid down, that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution. I think this case falls within that proposition, and therefore this conviction cannot be supported.

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[1] Concurring opinions of Cockburn, C. J., Coleridge, Cresswell, Erle, Crompton, and Crowder, JJ., Watson and Channell, B.B., are omitted.

WILLES, J.[1] I am of opinion at variance with those which have been generally expressed, but such as my opinion is I am bound to pronounce it, and I do so with the greater confidence, because it was the settled opinion of the late Chief Justice Jervis, than whom no man who ever lived was more competent to form a correct opinion upon the subject. I think that the conviction was right and that it ought to be affirmed. It appears to me, in looking through the cases, that a great number of the observations that have been thrown out with regard to the construction of the statute would not have been made if the words of the statute had been more strictly looked at; and that even some of the judgments would not have been pronounced if those who pronounced them had not permitted themselves to consider whether it would or would not be convenient to trade to adopt one interpretation or another. I think the words of the act should be implicitly followed, and the legislature should be obeyed according to the terms in which it has expressed its will in the 53d section of the 7 & 8 G. IV. c. 29. I am looking to the words of that section, and I am unable to bring myself to think that its framers were dealing with anything in the nature of a distinction between the case of goods fraudulently obtained by contract and goods so obtained without any contract. The section commences with the recital, "That whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud;" now this recital ought not on a proper construction, and according to those authorities by which we are bound, to have the effect of restraining the operation of the enacting clause. The enacting part of the section is, "if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is this, whether it was a false pretence by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained. Now in this case it appears that there was a false pretence; there was a pretence that the goods had as much silver upon them as Elkington's A; there was also the pretence that the foundations were of the best material. If I could bring myself to take the view which my brother Erle has taken of the statement of the case, that these were matters of opinion, and not matters of fact, which could be ascertained by inspection or calculation, possibly I might arrive at the same conclusion as he has done; but it appears to me on the face of the case that Elkington's A must have been a fixed quantity, and that the proper material, the best material for the foundation of such plated articles, must have been a well known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver and the quality of the foundation with the intent to defraud. It appears that the person who made the advance was thereby defrauded, — thereby induced to make the advance; the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of these statements he obtained the money mentioned in the indictment. It appears to me that, for all practical purposes, that ought to be taken to be a sufficient fact coming within the region of assertion and calculation, and not a mere speculative opinion, and that it should be considered a false pretence. If the misrepresentation was a simple commendation of the goods; if it was a mere puffing of the articles which were offered in pledge; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, — I apprehend it would have been easily disposed of by the jury who had to pass an opinion upon the question, acting as persons of common sense and knowledge of the world. It would be a question for them in such case whether the matter was such ordinary puffing that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract, intended to defraud, and by which the money in question was obtained. Well, then, there is the latter part of the section, "with intent to cheat and defraud any person of the same." It must be with the intention to cheat or defraud the person of the same, and that intention here is found to have existed; therefore I am unable to bring my mind to feel any anxiety to protect persons who make false pretences with intent to cheat and defraud. The effect of establishing such a rule as is contended for would, in my opinion, be rather to interfere with trade and to prevent its being carried on in the way in which it ought to be carried on. I am far from seeking to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to that which is called chaffering on the other; those are things persons may expect to meet with in the ordinary and usual course of trade. But as to the fear of multiplying prosecutions, I am afraid that we live in an age in which fraud is multiplied to a great extent, and in the particular form which this case assumes. I agree in what the late Chief Justice Jervis stated as most peculiarly applicable, namely, that as to such a commerce as requires to be protected by this statute being limited in the mode suggested, trade ought to be made honest and conform to the law, and not the law bend for the purpose of allowing fraudulent commerce to go on. I cannot help thinking therefore, upon the fair construction of the 53d section of the 7 & 8 G. IV. c. 29, the prisoner in this case having fraudulently represented that there was a greater amount of silver in the articles pledged than there really was, and that there was a superior foundation of metal (that being untrue to his knowledge), for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was indictable, and that the conviction should be affirmed.[1]

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[1] BRAMWELL, B., also delivered an opinion supporting the conviction.

REGINA v. GOSS; REGINA v. RAGG.

CROWN CASES RESERVED. 1860.

[*Reported* 8 *Cox C. C.* 262.]

REGINA v. GOSS.

CASE reserved for the opinion of this court by the Recorder of Northampton.

The prisoner, Thomas Goss, was tried before me at the last Michaelmas Sessions for the borough of Northampton, for obtaining money by false pretences.[2]

It was proved at the trial that the prosecutor, Thomas Roddis, on the 19th September last, was attending the cheese fair held within the borough of Northampton, and that the prisoner was in the fair, and sold to the prosecutor eight cheeses, weighing 1 cwt. 3 qrs. 1 lb. for which the prosecutor paid the prisoner the sum of £3 19*s.* 6*d.*, being at the rate of 4½*d.* per pound. On the prosecutor going into the fair, the prisoner offered to sell him the eight cheeses, and bored six of them with a cheese-scoop, and then produced and offered to the prosecutor several pieces of cheese, which are called "tasters," successively at the end of the scoop for the prosecutor to taste, and in order that he might taste them as being respectively samples and portions of the six cheeses which the prisoner had bored; and accordingly the prosecutor did taste them, and then offered the prisoner 4½*d.* per pound for the eight cheeses, which the prisoner accepted.

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[1] *Acc.* Reg. *v.* Levine, 10 Cox C. C. 374. *Contra,* Reg. *v.* Ardley, 12 Cox C. C. 23 See Reg. *v.* Evans, 9 Cox C. C. 238; Reg. *v.* Lawrence, 36 L. T. Rep. 404. — ED.

[2] The indictment is omitted.

The tasters, however, had not in fact been extracted from the cheeses offered for sale, for after the prisoner had bored the cheeses, and before he handed the tasters to the prosecutor, he took from his coat pocket pieces of cheese of better quality and description than those taken from the cheeses which he had bored, and privily and fraudulently put these pieces of cheese at and into the top of the scoop for the prosecutor to taste, and the cheese which the prosecutor did taste, was not any portion of the six cheeses which the prisoner bored.

The prosecutor, at the time he bought the eight cheeses, believed that he had been tasting a portion of those cheeses, and in that belief bought them, and paid the prisoner the £3 19*s.* 6*d.* for them, which he would not have done unless he had believed that the tasters had been extracted from the cheeses which he so bought. The cheeses were delivered to the prosecutor, and he retained possession of them up to the trial.

The value of the eight cheeses would be about 3*d.* per lb.

The prisoner's counsel at the trial objected that there was no evidence to support the indictment, or of any facts which would constitute a false pretence within the statute.

I left the case to the jury, and the prisoner was convicted; but having some doubt as to whether the case of Reg. *v.* Abbott 2 Cox Crim. Cas. 430, had not been shaken by subsequent decisions (see Reg. *v.* Bryan, 7 Cox Crim. Cas. 312), I reserved the case for the opinion of the Court of Appeal. JOHN H. BREWER.

No counsel was instructed to argue in behalf of the prosecution.

Merewether (for the prisoner). This case was reserved in consequence of the remarks of some of the judges upon the case of Reg. *v.* Abbott, 2 Cox Crim. Cas. 430, which was decided upon the authority of Reg. *v.* Kenrick, 5 Q. B. 49. The facts in the present case are precisely the same as in Reg. *v.* Abbott; and unless that case can be impeached, this conviction must, no doubt, be upheld. In Reg. *v.* Roebuck, 7 Cox Crim. Cas. 126, LORD CAMPBELL, C. J., said; "If this were *res integra*, I should not agree with Reg. *v.* Abbott, because I think that there the intention of the prisoner was to obtain a better bargain, and not *animo furandi;* but that having been decided by ten judges, I do not wish on the present appeal to disturb it." So in Reg. *v.* Eagleton, 6 Cox Crim. Cas. 559, the authority of Reg. *v.* Abbott and Reg. *v.* Kenrick was much disputed in the course of the argument; but the court said that it did not then become necessary to consider those cases. In Reg. *v.* Bryan, 7 Cox Crim. Cas. 312, the defendant, in order to obtain a loan on a quantity of plated spoons, represented to a pawnbroker that they were of the best quality, and were equal to Elkington's A (meaning spoons and forks made by Elkington, and stamped with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them the loan was obtained. Held (Willes, J., and Bramwell, B., *dissentientibus*), that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute. In Reg. *v.* Sherwood, 7 Cox Crim. Cas. 270, the prisoner, after he had agreed with the prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt, and that it had been weighed at the colliery, and the weight put down by himself on a ticket which he produced, he knowing it to be 14 cwt. only, and thereby obtained an additional sum of money; and this was held to amount to a false pretence within the statute. In that case a difficulty was felt by the court in drawing the line between indictable and non-indictable false representations.

The COURT said that they had no doubt about Reg. *v.* Abbott being a decision that they would act upon, and sound in principle, but they desired the case of Reg. *v.* Joseph Ragg (being on the same subject), to be called on before giving judgment.

REGINA *v.* RAGG.

Case reserved for the opinion of this court by the Chairman of the Leicestershire Quarter Sessions.

Joseph Ragg was tried before me at the General Quarter Sessions of the peace for the county of Leicester, held on the 3d January, 1860, for obtaining money under false pretences from Henry Harris.

The indictment stated the pretence to be, a false pretence as to the character and weight of a quantity of coals, sold and delivered by the prisoner to the prosecutor.

It appeared in evidence as follows: The prisoner was a coal dealer. On the 28th November he called at the house of the prosecutor in Loughborough, with a load of coals in a cart, and inquired if he (the prosecutor) wanted to buy a load of "Forest" coal. The prosecutor replied that the coals did not look like Forest coal, because they looked so dull. The prisoner replied, "I assure you they are Forest coal, and the reason of their looking so dull is because they have been standing in the rain all night; there is 15 cwt. of them, for I paid for 14 cwt. at the coal-pits, and they gave me 1 cwt. in." On this the prosecutor bought the coal, and paid 7*s.* 6*d.* for the load. The prisoner unloaded the cart, and packed the coals in the prosecutor's coal-place. When the prosecutor saw the coals in the coal-place, they appeared to be much too small a quantity to weigh 15 cwt., and he had them weighed, when it was found that they weighed 8 cwt. only.

The prisoner had at this time received his money and gone away, but the prosecutor went after him, challenging him with the fraud, and asking for redress. The prisoner, however, refused to make any, stating "that he did not make childish bargains, and that the prosecutor could not do anything to him, because he had not sold the coal by weight, but by the load."

The prosecutor stated that he had bought the coal on the representation of the prisoner that there were 15 cwt., and the size of the cart and the appearance of the coal therein, warranted the belief that there were 15 cwt.; but it turned out that the coal was loaded in a particular manner, technically known as "tunnelling;" that is, the coal (which is in large lumps) is so built up in the cart, that one lump rests on the edges of that below it, and large spaces are left between the lumps of coal, and thus there is an appearance of a greater quantity of coal than there actually is.

From further evidence, it appeared that the coal was not Forest coal at all, and had not been bought at the pits, but was Rutland coal, and bought that same morning at a wharf in the town of Loughborough; that the cart, when loaded at the wharf, had weighed 8 cwt. only, and although the prisoner stated that other coal had been added to it from another cart-load purchased at the same time from the wharf, there was no evidence of this produced at the trial.

It further appeared that on the same day, and a very short time after the coal was sold to the prosecutor, the prisoner had offered the same load to another person as containing 13 cwt., but on looking at the cart it was evident that the coal was "tunnelled," and the prisoner was then and there challenged with the fact, and told that there was not above 8 cwt. in the cart, or 10 cwt. at the most.

The prisoner was not defended by counsel, and the jury found him guilty.

With respect to the false pretence as to the "character" of the coal, it appeared to me, on inquiring of the witnesses, that there was not much real difference in value between the Forest coal and the Rutland coal, and that the preference of one over the other was rather according to the idea of the customer, than the actual value of the article; and I should not have considered it a case of false pretences under the statute had this been the only misrepresentation; but I considered that the evidence showed, not merely a false statement as to the quantity, but a preconceived intention to defraud, and a mode of packing the coal, resorted to for the purpose of fraud, and that therefore the jury properly found the prisoner guilty.

On referring, however, to the case of Reg. *v.* Sherwood, I found that some of the learned judges who gave judgment therein had apparently drawn a distinction between the case of a false representation made during the bargaining, and that made after the sale was completed; and in the present case, "as the false pretence was made in the course of the progress of a sale," I did not feel justified in sentencing the prisoner until the subject had come under the consideration of the judges. I therefore postponed the sentence, and directed that the prisoner might be liberated on bail to appear and receive sentence at the next Easter Sessions.

HY. J. HOSKINS, Deputy Chairman.

No counsel were instructed either for the prosecutor or prisoner.

ERLE, C.J. We are all of opinion that the conviction in each case was right. With reference to the case of Joseph Ragg, there was a false representation that the quantity of coals in the cart was 15 cwt., whereas only about 8 cwt. were delivered, and there was a pretence of a delivery of 7 cwt , no part of which had been delivered. And although the falsehood was only as to part of the entire quantity to be delivered, yet this falls within the class of cases of false representations as to the quantity of goods delivered, the principle of which is a false pretence of a matter of fact cognisable by the senses, which is an indictable offence within the statute. With regard to the case of Thomas Goss, there was also a false pretence of a matter of fact within the cognisance of the senses ; for by a sample which he falsely represented as a part of the very cheese to be sold, but which was part of a cheese altogether different both in substance and value, he procured the purchaser to buy the inferior cheese, and part with his money. That was a false pretence as to the substance of the article for sale, whereby the prisoner was enabled to pass off a counterfeit article as and for the genuine substance. In Reg. *v.* Roebuck, 7 Cox Crim. Cas. 126, it was held that falsely representing to a pawnbroker that a chain is silver, the prisoner knowing it to be a base metal, is indictable. So here the drawing from the prisoner's pocket, samples from another cheese, and not the cheese intended for sale, which was a totally different substance, and falsely pretending to the purchaser that those samples were part of the substance which he was to buy, that is equally an indictable offence within the statute, and falls within the class of cases to which belong Reg. *v.* Abbott, where the substance of the purchase was a cheese of the identical character with the taster ; and Reg. *v.* Dundas, 6 Cox Crim. Cas. 380, where the article sold was falsely pretended to be Everett's blacking, which was a known article in the neighborhood, whereas in fact the article passed off was a counterfeit. In the case of Reg. *v.* Bryan, the case of the plated spoons represented as equal to Elkington's A, the judges who constituted the majority decided that case on the principle, that indefinite praise on a matter of opinion, is not within the limit of indictable offences. A great deal of dissatisfaction has been expressed with that decision, as if it must operate as an encouragement to falsehood and fraud, and so lead to a great deal of mischief ; but it should be recollected what an extreme calamity it is to a respectable man, to have to stand his trial at a criminal bar as a cheat, upon an indictment at the instance of a dissatisfied purchaser. It is easy for an imaginative person to fall into an exaggeration of praise upon the sale of his goods. And if such statements are indictable, a person who wishes to get out of a bad bargain made by his own negligence, might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead of being obliged to bring an action, where each party would be heard on equal terms. It is of great public importance to endeavor to draw the line distinctly between false representations which are indictable, and those which are not. In the present case there was a false representation that an article was a genuine substance, and the passing off a counterfeit substance, and that was an indictable offence. My brother Willes, J., in Reg. *v.* Bryan, threw a great deal of light on the law as to false pretences, and though he differed from the majority of the judges in the decision, he did not differ from the principle of that decision, but only upon the application of that principle to the case. The majority of the judges thought the representation there to be a matter of opinion only; my brother Willes thought it a representation of a matter of fact, as if the representation had been, there is as much silver in the spoons as in Elkington's A, and in his judgment it was the false representation of a definite fact. We are therefore of opinion that this conviction must be affirmed.

Wightman, J. I am of the same opinion. I would merely add, with reference to the cheese cases and Elkington's case, one observation. If the prisoner had said that the cheeses were equal to the tasters produced, that would have fallen within the Elkington's case; but he said to the prosecutor, "These tasters are a part of the very cheeses I propose to sell to you;" and therefore it was a misrepresentation of a definite fact.

The rest of the court concurring.

Convictions affirmed.[1]

REGINA *v.* JENNISON.

Crown Case Reserved. 1862.

[*Reported* 9 *Cox C. C.* 158.]

Case reserved for the opinion of this court by Cockburn, C. J. John Jennison was indicted and tried before me at the last Assizes for the county of Nottingham for obtaining £8 from one Ann Hayes by false pretences.

The prisoner, who had a wife living, had represented himself to the prosecutrix, who was a single woman in service, as an unmarried man, and pretending that he was about to marry her, induced her to hand over to him a sum of £8 out of her wages received on leaving her service, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that having done so he would return and marry her. Having obtained the money the prisoner went away and never returned.

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[1] *Acc.* Reg. *v.* Foster, 2 Q. B. D. 301. See State *v.* Stanley, 64 Me. 157; Jackson *v.* People, 126 Ill. 139. — Ed.

The prosecutrix stated that she had been induced to part with her money on the faith of the representation of the prisoner that he was a single man, that he would furnish a house with the money, and would then marry her.

There was no doubt that these representations were false, and that morally the money had been obtained by false pretences. But it was contended on the part of the prisoner that, as the prosecutrix had been induced to part with the money by the joint operation of the three representations made by the prisoner, that he was unmarried, that he would furnish a house with the money, and that he would then marry her, and as only the first of these pretences had reference to a present existing fact, while the others related to things to be done in future, the indictment could not be maintained.

I reserved the point, and the prisoner having been convicted, have now to request the decision of the court upon the question.

A. E. COCKBURN.

No counsel appeared to argue on either side.

ERLE, C. J. We are of opinion that the conviction in this case was proper. The indictment was for obtaining £8 from Ann Hayes by false pretences, and it was found by the jury that the woman parted with the money on the false representation by the prisoner that he was a single man, and the promise that he would lay out the money in furnishing a house for them to live in, and that he would then marry her. It is perfectly clear that obtaining money by a false promise is not the subject of an indictment; but here there was the false pretence that the prisoner was an unmarried man, which was an essential fact in this case, and without which pretence the prisoner never would have obtained the money from the woman. Now, one false fact, by means of which the money is obtained, sufficiently sustains the indictment, although it may be united with false promises which would not of themselves do so. The conviction therefore was right.

The other judges concurring,

Conviction affirmed.[1]

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[1] *Acc.* Rex *v.* Young, Leach (4th ed.), 505, 3 T. R. 98; Com. *v.* Moore, 80 Ky. 542 See Reg. *v.* Johnston, 2 Moo. C. C. 254. — ED.

COMMONWEALTH *v.* DREW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[*Reported* 19 *Pickering*, 179.]

THE defendant was tried before Morton, J., upon two indictments, in each of which he was charged with having procured money from the Hancock Bank in Boston by false pretences, and with intent to defraud the bank, upon two several occasions.

The pretences alleged were: 1, that the defendant assumed the name of Charles Adams; 2, that he pretended that he wished to open an honest and fair account with the Hancock Bank, and to deposit and draw for money in the usual manner and ordinary course of business; and 3, that he pretended that two checks, described in the indictment, were good, and that he had in deposit the amount for which they were drawn.

It was proved, among other things, that the defendant began to deposit money in the bank early in December, 1835, and that he continued to deposit and draw, at various times and in various sums, until the 27th of January, 1836, on which day, having only $10 deposited to his credit, he drew a check for $100, which was paid at the bank.

On the 30th of January, 1836, a check for $350 was drawn by the defendant and paid at the bank, he having made no deposit since the payment of the check presented on the 27th of January.

The defendant deposited and drew his checks by the name of Charles Adams, and there was another person named Charles Adams who deposited at the bank at the same time; but it was not contended on the part of the Commonwealth, that the checks were paid because of the assumption by the defendant of the name of Charles Adams, nor that any mistake was made as to which person of that name drew the check.

Samuel B. Dyer, a witness on the part of the Commonwealth, testified that he was the paying and receiving teller of the bank; that the defendant first did business at the bank on the 12th of December, 1835; that he asked to have a large bill of the United States Bank exchanged for small bills, which was done; that before he left the bank he made a deposit of a considerable sum, including the bills just before received as above; that being asked in what name he wished to deposit, he said, in the name of Charles Adams; that he saw the defendant several times afterwards, when he presented his checks for payment; that the defendant usually drew his checks in the bank, at the desk kept for that purpose, and presented them himself, and that this was usually done by him about 12 o'clock, the most busy time in the forenoon; that the witness had no recollection of the presentation or payment of either of the two checks in question, which were overdrafts; that he knew they were paid out of his drawer and by his money, because he found the checks in his drawer and missed sums of money corresponding with the amount of the checks; that he believed that the check of January 27th was not paid by himself, but by the bank messenger for him, who took his place a few minutes at the counter, the messenger having told him he had paid a check of Charles Adams; that the witness paid checks of the defendant unhesitatingly, because he had deposited for some time, and the witness presumed his checks to be good from the general character of his account, and having seen him conversing with the president of the bank, the witness presumed he was acquainted with the president; that if the witness paid either of the two checks in question, without inquiring at the desk of the book-keeper or looking at the balance-sheet to ascertain whether the defendant had money to that amount deposited. it was upon these grounds that he so paid.

It was in evidence. that the book-keeper's desk was a few feet from the teller's counter; that when the teller doubted whether a check should be paid, he inquired of the book-keeper, or looked at the balance-sheet kept by the book-keeper, which was made up to the end of every day, and lay upon the desk for the inspection of the teller or book-keeper at all times.

It was testified by the teller, that the overdraft of the 27th of January was not reported for some days after it happened; and the balance-sheet showed that it did not appear upon that book until the 1st of February.

In order to show that the defendant overdrew with a fraudulent intent, it was proved, amongst other things, that he overdrew, about the same time, at the Bunker Hill Bank in Charlestown, and the Traders' Bank in Boston.

The counsel for the defendant contended, that there was no evidence of the procuring of money by any false pretence; that the mere drawing a check and presenting it at the counter of the bank to the teller for payment, no words being spoken and no false appearance or token presented or held out, although the drawer knew he had no funds deposited there, was not a "false pretence" within the meaning of the statute upon that subject; and that such presentation of a check, with intent to defraud the bank, and receiving the money upon the check, did not constitute the crime of obtaining money by false pretences, as defined by the statute; that it was no more than an appeal to the books of the bank. kept by the proper officer, and an offer to receive what should there be found due. But the judge overruled these objections, and instructed the jury, that if they believed that the defendant became a depositor at the bank under a pretence of doing business there in the usual manner, but with the fraudulent design to obtain the money of, and cheat the bank, and drew the checks and presented them at the bank for payment, knowing that he had not funds deposited sufficient to pay them, and that he did this intending to defraud the bank of the sums so overdrawn, although no words were spoken and no other token exhibited, and if he actually got the money, he was guilty of the crime of obtaining money by false pretences within the meaning of the statute. And it was left to the jury to decide upon all the evidence, whether the false pretences and the averments contained in the indictment were proved to their satisfaction or not.

The jury found a verdict against the defendant upon both indictments.

The defendant moved for a new trial, because of the ruling and instructions of the judge, and because the verdict as to the presentation of the checks by the defendants was not supported by the evidence.

H. H. Fuller supported the motion. As to the third false pretence, he cited St. 1815, c. 136; 3 Chit. Crim. Law, 997; Allen's case, 3 City Hall Recorder, 118; Stuyvesant's case, 4 City Hall Recorder, 156; People *v.* Conger, 1 Wheeler's Crim. Cas. 448; People *v.* Dalton, 2 Wheeler's Crim. Cas. 178; Witchell's case, 2 East's P. C. 830; Story's case, Russ. & Ryan, 81; Freeth's case, ib. 127.

Austin (Attorney-General), and *Parker* (District-Attorney), for the Commonwealth, cited Roscoe on Crim. Ev. (2d ed.) 417 *et seq.;* Lockett's case, 1 Leach, 110; Commonwealth *v.* Wilgus, 4 Pick. 177; 2 East's P. C. 828; Young *v.* The King, 3 T. R. 102; Rex *v.* Jackson, 3 Campb. 370.

Morton, J., delivered the opinion of the court. These indictments are founded upon St. 1815, c. 136. The first section provides, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons money, goods, wares, merchandise or other things, with intent to cheat or defraud any person or persons of the same, shall on conviction" be punished, &c., as therein specified. This section, which is a copy of St. 30 Geo. II. c. 24, § 1, is revised and combined with some provisions in relation to other similar offences, in the Revised Stat. c. 126, § 32.

To constitute the offence described in the statute and set forth in these indictments, four things must concur and four distinct averments must be proved.

1. There must be an intent to defraud;

2. There must be an actual fraud committed;

3. False pretences must be used for the purpose of perpetrating the fraud; and,

4. The fraud must be accomplished by means of the false pretences made use of for the purpose, viz., they must be the cause which induced the owner to part with his property.

It is very obvious that three of the four ingredients of the crime exist in the present case. The fraudulent intent, the actual perpetration of the fraud, and the fact that some of the pretences used were the means by which it was accomplished, are established by the verdict of the jury. And although the prisoner's counsel has objected to the sufficiency of the evidence, yet we see no reason to question the correctness of their decision. It only remains for us to inquire, whether the artifices and deceptions practised by the defendant, and by means of which he obtained the money, are the false pretences contemplated by the statute.

The pretences described in the indictments and alleged and shown to be false, are,

1. That the defendant assumed the name of Charles Adams;

2. That he pretended that he wished to open an honest and fair account with the Hancock Bank, and to deposit and draw for money in the usual manner and ordinary course of business;

3. That he pretended that the checks were good, and that he had in deposit the amount for which they were drawn.

The first is clearly a false pretence within the meaning of the statute; and had the money been obtained by means of the assumption of this fictitious name, there could be no doubt of the legal guilt of the defendant. The eminent lawyer who filled the office of mayor of New York, when the adjudication referred to by the defendant's counsel was made, says the false pretences must be the sole inducement which caused the owner to part with his property. People *v.* Conger, 1 Wheeler's Crim. Cas. 448; People *v.* Dalton, 2 ib. 161. This point is doubtless stated too strongly; and it would be more correct to say, that the false pretences, either with or without the coöperation of other causes, had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property. People *v.* Haynes, 11 Wendell, 557. But in this case the assumed name, so far from being the *sole* or *decisive* inducement, is clearly shown to have had no influence whatever. The bank officers did not confound the defendant with Charles Adams, and it does not appear that the defendant knew that there was any other person by that name. He never claimed any credit on account of his name, and the coincidence might have been accidental. At any rate, it had no influence upon the credit of either, nor any effect upon their accounts or the payment of their checks.

2. The opening and keeping an account with the Hancock Bank might have been, and doubtless was, a part of a cunning stratagem, by which the defendant intended to practise a fraud upon that bank. But the business was done and the account kept in the usual manner. The defendant made his deposits and drew his checks like other customers of the bank. He made no representation of the course he intended to pursue, and gave no assurance of integrity and fair dealing; and we can see nothing in the course of this business constituting it a false pretence, which would not involve the account of any depositor who might overdraw in the same category.

3. The pretence, if any such there were, that the check was good, or that the defendant had funds in the bank for which he had a right to draw, was false. He had no such funds. Did the defendant make any such pretence? He made no statement or declaration to the officers of the bank. He merely drew and presented his checks, and they were paid

This was done in the usual manner. If, then, he made any pretence, it must result from the acts themselves.

What is a false pretence, within the meaning of the statute? It may be defined to be a representation of some fact or circumstance, calculated to mislead, which is not true. To give it a criminal character there must be a *scienter* and a fraudulent intent. Although the language of the statute is very broad, and in a loose and general sense would extend to every misrepresentation, however absurd or irrational, or however easily detected, yet we think the true principles of construction render some restriction indispensable to its proper application to the principles of criminal law and to the advantageous execution of the statute. We do not mean to say that it is limited to cases against which ordinary skill and diligence cannot guard, for one of its principal objects is to protect the weak and credulous from the wiles and stratagems of the artful and cunning; but there must be some limit, and it would seem to be unreasonable to extend it to those who, having the means in their own hands, neglect to protect themselves. It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur. 2 East's P. C. 828; Young *v.* The King, 3 T. R. 98.

It is not the policy of the law to punish criminally mere private wrongs; and the statute may not regard naked lies as false pretences. It requires some artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard. He may be weak and confiding, and his very imbecility and credulity should receive all practical protection. But it would be inexpedient and unwise to regard every private fraud as a legal crime. It would be better for society to leave them to civil remedies. Roscoe on Crim. Ev. (2d ed.) 419; Goodhall's case, Russ. & Ryan, 461.

The pretence must relate to past events. Any representation or assurance in relation to a future transaction may be a promise or covenant or warranty, but cannot amount to a statutory false pretence. They afford an opportunity for inquiring into their truth, and there is a remedy for their breach, but it is not by a criminal prosecution. Stuyvesant's case, 4 City Hall Recorder, 156; Roscoe on Crim. Ev. (2d ed.) 422; Rex *v.* Codrington, 1 Car. & Payne, 661. The only case, Young *v.* The King, 3 T. R. 98, which has been supposed to conflict with this doctrine, clearly supports it. The false pretence alleged was, that a bet had been made upon a race which was to be run. The contingency which was to decide the bet was *future*, but the making of the bet was *past.* The representation which turned out to be false was, not that a race would be run, but that a bet had been made. The false pretence, therefore, in this case, related to an event already completed and certain, and not to one which was thereafter to happen and consequently uncertain; and the decision was perfectly consistent with the doctrine and law here laid down.

A false pretence, being a misrepresentation, may be made in any of the ways in which ideas may be communicated from one person to another. It is true that the eminent jurist before referred to in the cases cited held that it could be made only by verbal communications, either written or oral. If this be correct, no act or gestures, however significant and impressive, could come within the statute; and mutes, though capable of conveying their ideas and intentions in the most clear and forcible manner, could hardly be brought within its prohibition. Can it make any difference in law or conscience whether a false representation be made by words or by the expressive motions of the dumb? Each is a language. Words are but the signs of ideas, and if the ideas are conveyed, the channel of communication, or the garb in which they are clothed, is but of secondary importance. And we feel bound to dissent from this part of these decisions. In this we are supported by the English cases. Rex *v.* Story, Russ. & Ryan, 81; Rex *v.* Freeth, ib. 127.

The representation is inferred from the act, and the pretence may be made by implication as well as by verbal declaration. In the case at bar the defendant presented his own checks on a bank with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretences. A check, like an order on an individual, is a mere request to pay; and the most that can be inferred from passing it is, that it will be paid when presented, or in other words that the drawer has in the hands of the drawee either funds or credit. If the drawer passes a check to a third person, the language of the act is, that it is good and will be duly honored; and in such case, if he knew that he had neither funds nor credit, it would probably be holden to be a false pretence.

In the case of Stuyvesant, 4 City Hall Recorder, 156, it was decided that the drawing and passing a check was not a false pretence. But in Rex *v.* Jackson, 3 Campb. 370, it was ruled that the drawing and passing a check on a banker with whom the drawer had no account and which he knew would not be paid, was a false pretence within the statute. This doctrine appears to be approved by all the text writers, and we are disposed to adopt it. Roscoe on Crim. Ev. (2d ed.) 419.

But to bring these cases within the statute, it must be shown that the drawer and utterer knew that the check would not be paid, and in the cases cited it appeared that he had no account with the banker. In these respects the case at bar is very distinguishable from the cases cited. If the checks in question had been passed to a third person, it could not be said that the defendant knew that they would not be paid. On the contrary, he had an open account with the bank, and although he knew there was nothing due to him, yet he might suppose that they would be paid; and the fact that he presented them himself, shows that he did not know that they would be refused.

The defendant presented the checks himself at the counter of the bank. They were mere requests to pay to him the amount named in them, couched in the appropriate and only language known there, and addressed to the person whose peculiar province and duty it was to know whether they ought to be paid or not. He complied with the requests, and charged the sums paid to the defendant, and thus created a contract between the parties. Upon this contract the bank must rely for redress.

This case lacks the elements of the English decisions; and we think it would be an unwise and dangerous construction of the statute to extend it to transactions like this. The case may come pretty near the line which divides private frauds from indictable offences; and at first we were in doubt on which side it would fall. But, upon a careful examination, we are well satisfied that it cannot properly be brought within the statute. *Verdict set aside and new trial granted.*[1]

COMMONWEALTH v. NORTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865.

[*Reported* 11 *Allen*, 266.]

INDICTMENT for obtaining money under false pretences. The first count charged that the defendant falsely pretended to Charles Connell that a few days before he, the defendant, was in Connell's place of business and had two drinks, and gave to Connell five dollars, from which Connell was to take twenty cents, but that Connell did not return any change; and Connell, believing said false representations, and being deceived and induced thereby, paid to Norton four dollars and eighty cents; whereas in truth Norton had not given the five dollars to Connell, and the various representations of Norton were all false.

There were three other counts charging similar transactions with other and different persons.

The defendant pleaded guilty to this indictment in the Superior Court, and thereupon Lord, J., deeming the questions of law arising thereon, as to whether the allegations of the indictment constituted an indictable offence, so important and doubtful as to require the decision of this court, reported the same, by the consent and desire of the defendant.

No counsel appeared for the defendant.

Reed, A. G., for the Commonwealth, cited Commonwealth *v.* Drew, 19 Pick. 182; The People *v.* Johnson, 12 Johns. 293; Young *v.* The King, 3 T. R. 102; Rex *v.* Wheatly, 2 Burr. 1128.

DEWEY, J. It seems to us that the present case is one which the court may properly consider as not embraced within the intention of the framers of the statute punishing the obtaining of goods by wilfully false pretences. The case as presented by the indictment is the naked case of a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the party who made it. The indictment alleges the false statements to have been that the same person alleged to have been defrauded had on a previous day named received of the defendant a certain bankbill for the payment of certain "drinks" furnished to the defendant, and had not given back any change. The case was one of a demand of money as of right, growing out of what might have been an illegal sale of liquors, and was yielded to by the seller, he being personally connected with all the alleged facts, and voluntarily submitting to the demand thus made upon him. It was said by this court in Commonwealth *v.* Drew, 19 Pick. 184, that "although the language of the statute (St. 1815, c. 136) is very broad, and in a loose and general sense would extend to every misrepresentation, however absurd or irrational or however easily detected; yet we think the true principles of construction render some restriction indispensable to its proper application. . . . It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur."

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[1] See Rex *v.* Parker, 7 C. & P. 825; People *v.* Wasservogle, 77 Cal. 173; Barton *v.* People, 135 Ill. 405. Compare Com. *v.* Schwartz (Ky.) 18 S. W. 358. — ED.

These remarks apply equally to Gen. Sts. c. 161, § 54, and in the opinion of the court the facts alleged in this indictment do not present a case which should be held to fall within the spirit and purpose of the statute. We are aware that some of the English judges have given a more extended construction of their statute in cases that have there arisen. *Judgment arrested.*[1]

COMMONWEALTH *v.* WHITCOMB.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[*Reported* 107 *Massachusetts*, 486.]

CHAPMAN, C. J. By the Gen. Stats. c. 161, § 54, whoever "designedly, by a false pretence or by a privy or false token, and with intent to defraud, obtains from another person any property," &c., "shall be punished," &c. The defendant falsely pretended to the Reverend Mr. Peck, a Methodist clergyman, that he was himself a Methodist clergyman, and pastor of a Methodist church in Waterville, Kansas, and that on the preceding Lord's day he had preached in the church of the Reverend Charles Fowler, of Chicago; that he was poor, penniless, and utterly destitute, and had that day been robbed of all his money; and he thereby obtained of Mr. Peck six dollars as a charity. He afterwards admitted that these representations were false. His only defence is, that the statute does not include cases where the money is parted with as a charitable donation.

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[1] *Contra* Reg. *v.* Woolley, 1 Den. C. C. 559; Reg. *v.* Jessop, 7 Cox C. C. 399. See Reg. *v.* Coulson, 1 Den. C. C. 592. Compare Com. *v.* Lee, 149 Mass 181. — ED.

But it is obvious that the case comes within the words of the statute. It comes also within the reason of the statute. There is as much reason for protecting persons who part with their money from motives of benevolence, as those who part with it from motives of self-interest. The law favors charity as well as trade, and should protect the one as well as the other from imposture by means of false pretences. Obtaining money by means of letters begging for charity on false pretences is held to be within the English statute (7 & 8 Geo. IV. c. 29, § 53), which is quite similar to ours. Regina *v.* Jones, 1 Denison, 551; Regina *v.* Hensler, 11 Cox Crim. Cas. 570.

A contrary doctrine has been held in New York. People *v.* Clough, 17 Wend. 351. The court admitted that the crime was of a dark moral grade, and was within the words of the statute of New York, which was copied from the English statute of 30 Geo. II. c. 24. They adopted that construction chiefly on the ground that the preamble to the statute referred to trade and credit. But our statute, like the existing English statute, refers to no such matter, and is not restricted by any preamble.

Exceptions overruled.

COMMONWEALTH *v.* HARKINS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[*Reported* 128 *Massachusetts*, 79.]

COLT, J.[1] The defendant was indicted for obtaining money from the city of Lynn by false pretences. He moved to quash the indictment on the ground that it did not set forth an offence known to the law.

It is alleged in substance that the defendant falsely represented to the city of Lynn, through its agent, the city solicitor, that a street which the city was bound to repair had been suffered to be out of repair, and that the defendant, while travelling thereon with due care, was injured by the defect; that the defendant at the same time exhibited an injury to his foot and ankle, and represented that it was caused by the alleged defect. It is further alleged that the city and its solicitor were deceived by these representations, and, being induced thereby, agreed to the entry of a judgment against the city in a suit then pending in favor of the defendant in this case; and upon the entry thereof paid the amount of the same to him. It is not alleged that the suit was to recover damages on account of the defendant's injury from the alleged defect; but we assume that this was so, for otherwise there could be no possible connection, immediate or remote, between the pretences charged and the payment of the money in satisfaction of the judgment recovered.

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[1] The opinions only are given; they sufficiently state the case.

In the opinion of a majority of the court, this indictment is defective. The facts stated do not constitute the offence of obtaining money by false pretences. The allegations are, that an agreement that judgment should be rendered was obtained by the pretences used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged that, after the judgment was rendered, any false pretences were used to obtain the money due upon it; and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay. Commonwealth *v.* McDuffy, 126 Mass. 467; People *v.* Thomas, 3 Hill, 169; Rex *v.* Williams, 7 Car. & P. 354. A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment obtained by the defendant was reversed, the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it cannot be said that the money paid upon it was in a legal sense obtained by false pretences, which were used only to procure the consent of the city that the judgment should be rendered.

The indictment alleges the fact of a judgment in favor of the defendant, which if not conclusive as between the parties to this criminal prosecution, is at all events conclusive between the parties to the transaction. To hold that the statute which punishes criminally the obtaining of property by false pretences, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretences were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution criminally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property.

SOULE, J. I am obliged to differ from the majority of the court, and am authorized to state that the Chief Justice and Mr. Justice Ames concur with me. As the case involves questions of importance in the administration of public justice, it has seemed to us proper to state our views of them. In doing this, it is necessary to discuss several points which are raised by the exceptions, but are not treated of in the opinion of the court, because they have become immaterial to the decision which has been reached by the majority.

The indictment sets forth that the defendant, with intent to cheat and defraud, made certain false representations and pretences, as to matters within his knowledge and relating to existing facts as well as to past transactions, concerning which neither the city of Lynn nor its agent had the means of knowing the truth, and that, by means of these representations and pretences, the city, believing them to be true, was induced to and did part with its money to the defendant. It further sets forth that the defendant received the money by means of the false pretences, and with intent to cheat and defraud the city of Lynn, and that the several representations and pretences were not true. It therefore charges an offence. Commonwealth *v.* Hooper, 104 Mass. 549; Commonwealth *v.* Parmenter, 121 Mass. 354.

The additional allegations as to the consent to the entry of judgment and the satisfaction of the judgment are merely a narration of the methods by which the parties proceeded in paying and receiving the money, and are wholly unnecessary, but they do not charge another offence, nor make the indictment bad for duplicity. The obtaining of the money by false pretences is the gist of the offence, not the obtaining of the judgment.

The fact that the judgment obtained by the defendant remains unreversed constitutes no objection to the indictment. It is true that, as a matter of public policy, an unreversed judgment is conclusive between the parties and their privies, in accordance with the maxim, *Interest reipublicæ ut sit finis litium.* And this principle goes so far that one cannot sustain an action against another for obtaining a judgment against him by means of conspiracy and fraud, if he had an opportunity to be heard at the trial of the cause in which the judgment was obtained. Castrique *v.* Behrens, 3 E. & E. 709; Huffer *v.* Allen, L. R. 2 Ex. 15.

But it is equally true that a judgment is conclusive only between the parties and their privies, and that strangers are not bound nor affected by it. To the indictment the Commonwealth is a party, but was a stranger to the action between the city of Lynn and the defendant, in which the judgment was recovered. That judgment is, therefore, no evidence against the Commonwealth that the defendant was entitled to recover anything of the city. It has no bearing on the case at bar, except as being a part of the machinery employed in obtaining the money wrongfully. Its existence is no bar to prevent the Commonwealth from showing, in its prosecution of crime, that it and the money were obtained by false pretences. To hold otherwise would be to provide a shield for the criminal in his own crime. There is nothing in this view of the law, which conflicts with the decision in the recent case of Commonwealth *v.* McDuffy, 126 Mass. 467. It was there held, that one who obtains only what is due him by false pretences commits no punishable offence. It was not held that the Commonwealth was estopped to prove the truth, by a judgment to which it was not a party. The general doctrine, that only parties and privies are concluded by a judgment, is too familiar to require the citation of authorities in its support. An application of it peculiarly pertinent to the case at bar was made in The Duchess of Kingston's case, 20 Howell's St. Tr. 355.

The indictment is not defective on the ground of remoteness of the false representations from the obtaining of the money. Ordinarily the question of remoteness is one for the jury, and can be presented to this court only on a report of the evidence after a refusal by the presiding judge to rule that the evidence will not warrant a conviction. As an objection to the indictment, it is in substance that the indictment shows that the money was obtained on a valid judgment, and therefore cannot be held to have been obtained by the false pretences. But this point is not tenable. The test is the direct connection between the pretence and the payment of the money. There was no purpose in either party to the transaction that the matter should go to the extent of entering up the judgment, and rest there; the judgment was, in and of itself, of no importance. It was only a means to an end, and it was for the jury to say whether the false pretences were an inducement for the payment.

In the case of Regina *v.* Gardner, Dearsly & Bell, 40, and 7 Cox C. C. 136, cited by the defendant, it was held that the false pretence was exhausted by obtaining a contract for lodging, and did not extend to the contract for board also, made after the defendant had been a lodger with the prosecutor for more than a week. In Regina *v.* Bryan, 2 F. & F. 567, board and lodging had been obtained by means of false pretences, and, sometime after the contract therefor, the prisoner borrowed sixpence of the person with whom he had made the contract and was lodging, and it was held that the money was not obtained by the false pretence.

But in Regina *v.* Martin, L. R. 1 C. C. 56, it was held that the question of remoteness was for the jury, and that a conviction was warranted when the prisoner had ordered a van to be made, under the false pretence that he acted for the Steam Laundry Company of Aston, which he represented to be composed of leading men of Birmingham, and before it was delivered to him countermanded the order, and afterward agreed to receive it if certain alterations were made in it, which were made, and it was subsequently delivered. In that case it is said that, in order to justify a conviction, there must be a direct connection between the pretence and the delivery of the chattel, and that whether there is such a connection or not is a question for the jury; and, further, that since the cases of Regina *v.* Abbott, 1 Denison, 273, and Regina *v.* Burgon, Dearsly & Bell, 11, it is impossible to contend seriously that the case is not within the statute, because the chattel is obtained under a contract induced by the false pretence.

The false representations and pretences set forth in the indictment are of such a character as to bring the transaction within the statute. It is sometimes said that a naked lie is not within the statute; and, as applied to particular cases, this is true; as when one falsely represents to a saloon-keeper that, a few days before, he gave the keeper five dollars out of which to take twenty cents in payment for drinks, and that the keeper did not return any change; Commonwealth *v.* Norton, 11 Allen, 266; or where one draws his check on a bank in which he has no money, and presents it at the bank for payment. Commonwealth *v.* Drew, 19 Pick. 179. In those cases the lie is told to one who has the same means with the liar of knowing what the fact is. In the case last cited it was said that passing a check drawn on a banker with whom the drawer has no account, and which he knew would not be paid, would be within the statute; and the English decisions are so. The difference between the two is merely that in one case the lie or false pretence is made to one who is in a situation to know the facts, and in the other to one who is not in such situation. The true rule seems to be, that a case is within the statute if the alleged false pretence is an intentionally false representation as to an existing fact or past transaction, made to one who has not the means of knowing the truth in the premises, for the purpose of inducing him thereby to part with his property.

This case comes up on exceptions to a refusal to quash the indictment, and it is argued that there was no such relation of trust and confidence between the defendant and the city of Lynn as would justify a belief in the representations made, and lay a foundation for an indictment under the statute. But, as has already been said, there are sufficient allegations to constitute a good indictment, and the question whether they were proved or not is one of evidence, and not of pleading. Moreover, it is not true, as matter of law, that one who is negotiating a settlement of an alleged claim for damages cannot bring himself within the statute by making false representations and obtaining money thereby. In Regina *v.* Copeland, Car. & M. 516, the prisoner, a married man, who had obtained a promise of marriage from a single woman which she refused to fulfil, threatened her with an action at law for breach of her promise, and added that he could thereby take half her fortune from her, and she, believing the statement and threat, paid him one hundred pounds sterling. The prisoner was convicted, and the conviction was sustained by Lord Denman and Mr. Justice Maule.

The question whether the false pretences were believed and induced the payment is for the jury. To quash the indictment on the ground that the circumstances of the transaction would not justify a conviction, would be to quash it for matters *dehors* the record.

That the wrong is a private one is no objection to the prosecution, although it has been said in many cases that the statute is not intended for the punishment of every private wrong. In all the cases above cited in which a conviction was sustained the wrong was a private one, in the same sense as in the case at bar; it is a public wrong in this, as in those cases, in that it is within the statute which provides for punishment of the wrongdoer. The purpose of the statute was to extend the punishment to cases which were not reached by the common law, and its language is broad and comprehensive. Its operation ought not to be limited by phrases of indefinite meaning which fail to state any principle of construction.

Exceptions sustained.

REGINA *v.* LARNER.

CENTRAL CRIMINAL COURT. 1880.

[*Reported* 14 *Cox. C. C.* 497.]

WILLIAM LARNER was charged under an indictment containing counts for false pretences, forgery, and uttering. The first count set forth the false pretences as follows: "That the said William Larner was member of a certain club called and known as the Myddleton Swimming and Athletic Club, and that a certain letter which he, the said William Larner, had caused to be received by one Alfred Ernest Endin, had then been written and sent by one Henry Green, the secretary of the said club, and that he, the said William Larner, as member and competitor in certain club swimming races and matches by members of the said club, had been allowed to start from the starting point twenty-five seconds before certain other competitors."

Purcell for the prosecution.

Keith Frith and *Rundle Lerey* for defendant.

On the 23rd day of August a swimming handicap took place at the Surrey County Baths. Entries were to be made previously to Alfred Endin, Esq., and competitors to be handicapped by qualified persons. A competitor's ticket was issued by Mr. Endin to each accepted entry. The length of the course was 100 yards, and there being a good many entries, the race was swum in heats.

A programme was printed and circulated, containing, amongst other matters, the names of the competitors and the arrangement of the various heats, and on that programme appeared the name of W. Larner, to whom a start of twenty seconds had been assigned.

Some days before the issuing of the programme, Mr. Endin received the following letter:

Nelson Club, 90, Dean-street, Oxford-street.
August 19, 1880.

Sir,—I inclose entrance fee for another entry for your 100 yards handicap. W. Larner (Middleton Swimming and Athletic Club) in Club races receives twenty-five seconds from scratch.—I remain, sir,

Yours respectfully,
H. GREEN, Hon. Sec.

Another letter of the same kind had been received by Mr. Endin, entering one Binns for the same race. The letters were received in the usual course through the Post Office. The two entries of Larner and Binns were accepted, and the entrance fee of 2*s.* 6*d.* each paid. Mr. Endin stated that he knew nothing about Larner or his accomplishments as a swimmer; that he received his entry in consequence of the representations contained in the letter, and that the start of twenty seconds was apportioned to him for the like reason. He further stated that he handed Larner a competitor's ticket; that Larner swam in the competition, and after being second in his own heat, won the final easily. It was believed that Larner could have won the race from scratch.

For the prisoner it was objected that the false pretences were too remote, that if he obtained anything thereby, it was the competitor's ticket, and not the cup; that the cup was obtained by his own bodily activity; and that the case fell within Reg. *v.* Gardner (1 Dears. & B. C. C. p. 40; 7 Cox C. C. 136), in which case the prisoner had at first obtained lodgings only by a false representation, and after he had occupied the lodgings for a week he obtained board; and it was held that the false pretences were exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made.

For the prosecution it was urged that the false pretence was a continuing one, that the winning of the cup was clearly in the contemplation of the prisoner when he entered for the race, and that the judgment of WILLES, J., in Reg. *v.* Gardner, citing Reg. *v.* Abbott and Reg. *v.* Burgess, was an authority the other way. They also cited Reg. *v.* Martin (L. Rep. 1 Cr. Cas. Res. 56; 10 Cox C. C. 383).

Held, by the Common Serjeant, after conferring with STEPHEN, J., in the Old Court, that the objection must prevail as the false pretences were too remote.

The prisoner was afterwards tried for uttering the letter, knowing it to be forged, and convicted.

REGINA *v.* BUTTON.

COURT FOR CROWN CASES RESERVED. 1900.

[*Reported* 1900, 2 *Q. B.* 597.]

CASE stated by the recorder of Lincoln.

The prisoner was charged with attempting to obtain goods by false pretences.

On August 26, 1899, there were athletic sports at Lincoln, for which prizes were given. Among the contests were a 120 yards race and a 440 yards race, in respect of each of which a prize was given of the value of ten guineas.

Among the names sent in for these two contests was the name of "Sims. C., Thames Ironworks A. C.," and two written forms of entry were sent in to the secretary of the sports, containing (as appeared to be usual) a statement as to the last four races in which Sims had run, together with a statement that he had never won a race. These forms were not sent by Sims, nor were they in his handwriting, and he knew nothing of them. They were however signed in his proper name, and with his true address, and contained a correct account of his last four performances. The forms were proved to be not written by the prisoner.

The performances of Sims were very moderate, and, as a fact, he was only a moderate runner, and as a result the supposed Sims was given by the handicapper of the sports a start of 11 yards in the 120 yards race and a start of 33 yards in the 440 yards race.

Sims was ill at Erith when the races were run, and was not at Lincoln at all, and he was personated by the prisoner, who was a fine performer and won both contests very easily.

The suspicion of the handicapper being aroused, he asked the prisoner, after the 120 yards race, whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race. To these questions the prisoner answered that he was Sims, that the performances were his own, and that he had never won a race. All these statements were untrue, and in particular he had won a race at Erith in his own name. The handicapper was called as a witness, and swore that he would not have given the prisoner such favorable starts if he had known his true name and performances.

These facts were all admitted, and no evidence was called to contradict them. It was, however, suggested for the defence that the prisoner might have done it for "a lark," or might have possibly done it in order to keep himself in good training. In summing up the case to the jury, the recorder told them that if the prisoner did it for "a lark," without any criminal intent, and without intending to get the prizes, they ought to find him not guilty; but that if he made the false representations wilfully, intentionally, and fraudulently, with intent to obtain the prizes, they ought to find him guilty of attempting to obtain them by false pretences.

The jury found a verdict of guilty.

It was contended for the prisoner that, on the authority of Reg. *v.* Larner, 14 Cox C. C. 497, the obtaining the prizes was too remote from the false representation and that he ought to be acquitted. The recorder overruled the objection, but agreed to state this case. A case decided by Lord Lindley at Nottingham Assizes, Reg. *v.* Dickenson, (1879) Roscoe's Criminal Evidence, 432, 433, 12th ed.; 2 Russell on Crimes, Book III., cap. xxxii., s. ii., p. 511, 6th ed.; Times of July 26, 1879, appeared to be contrary to Reg. *v.* Larner, *supra.*

The questions of law for the opinion of the Court were: —

(1.) Whether the recorder had summed up the case correctly to the jury.

(2.) Whether the attempt to obtain the prizes was too remote from the pretence.

J. Percival Hughes, for the defendant. The conviction is bad. There was no completed criminal offence, for, assuming that the defendant did make the representations alleged for the purpose of obtaining a longer start in the handicaps than he would have got if he had entered in his own name and disclosed his previous performances truthfully, still there is nothing to shew that he may not have done what he did for amusement, or to keep himself in training, for it is not shewn that he ever applied for the prizes, and even if in the first instance he intended to get the prizes, which is not clearly shewn, still until he applied for them there was a locus pœnitentiæ, and he might never have taken the prizes at all.

[MATHEW, J. Those are questions of fact, and the verdict of the jury negatives the suggestions on behalf of the defendant.]

The intention to obtain the prizes is too remote from the representations. What he really obtained was more favourable terms in handicaps. He came in first owing to his good running. Reg. *v.* Larner, *supra,* is a strong authority against the conviction. [He also referred to Reg. *v.* Eagleton, (1855) 6 Cox C. C. 559; 24 L. J. (M.C.) 158; Reg. *v.* Gardner, (1856) 7 Cox C. C. 136; Dears. & B. C. C. 40.]

Montague Shearman (*T. Hollis Walker* with him), for the prosecution, was not called on.

MATHEW, J. The conviction in this case must be upheld. The case of Reg. *v.* Larner, *supra*, is relied upon as an authority for the defendant. In that case question was one of fact, and the Common Serjeant directed the jury according to his impression of the view of the law taken by Stephen J., whom it appears from the report he had consulted; but that case is contrary to the ruling of Lord Lindley in a case tried before him at the Nottingham Assizes, *supra*, and I am clearly of opinion that Lord Lindley was right. The questions to be decided in the present case were pure questions of fact, namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the representations with that intention. It appears from the case that he pretended to be a man who had never won a foot-race, and he was handicapped on the faith of that statement, as is shewn by the evidence given by the handicapper; but it also appears from the case that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the jury, and they have negatived the suggestion. It was also contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, for by means of the false pretences he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because it was not shewn that he had applied for the prizes, and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact, he was found out before he had the opportunity of applying for the prizes. as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good.

Lawrance, J., concurred.

Wright, J. I am of the same opinion. If nothing more had been shewn than that the defendant had entered for the races in a false name, the case would have been different. If he did not run or claim the prize, it would be difficult to say that there was an actual attempt to obtain it. But here in effect he did claim the prize.

Kennedy and Darling, JJ., concurred

Conviction affirmed.

Note on Intent to Defraud. — As to the requisite intent to defraud see Rex *v.* Wakeling, Russ. & Ry. 504, *supra;* Rex *v.* Naylor, L. R. 1 C. C. R. 4, 10 Cox C. C. 149; Com. *v.* Schwartz (Ky.), 18 S. W. 358. See also Penny *v.* Hanson, 16 Cox C. C. 173. This was a prosecution under 5 Geo. IV. ch. 83, s. 4, for "pretending or professing to tell fortunes or using any subtle craft to deceive and impose on" the prosecutor. The defence was that no evidence had been presented of an intent to deceive. The evidence showed that defendant offered to tell the prosecutor's fortune by means of astrology. Denman, J., said: "This is an instance to which the doctrine *res ipsa loquitur* applies. It is nonsense to suppose that in these days of advanced knowledge the appellant really did believe he had the power to predict a man's future by knowing at what hour he was born, and the position of the stars at the particular moment of his birth. No person who was not a lunatic could believe he possessed such power. There was therefore no need on the part of the prosecution to negative his belief in such power or capacity. The magistrate rightly drew an inference that the appellant had an intent to deceive and impose on the prosecutor." — Ed.

CHAPTER XI.

RECEIVING STOLEN PROPERTY.

SECTION I.

The Receiving.

REX *v.* RICHARDSON.

OLD BAILEY. 1834.

[*Reported* 6 *Carrington & Payne*, 335.]

FOUR of the prisoners were indicted for sacrilegiously breaking and entering a chapel, called St. Philip's Chapel, in the parish of Clerkenwell, and stealing therein certain things. The other prisoner was charged as receiver.[1]

TAUNTON, J. (in summing up with respect to the receiver), said: Whether he made any bargain or not is a matter of no consequence. If he received the property for the mere purpose of concealment without deriving any profit at all he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute.

Verdict, three of the prisoners guilty and two of them not guilty.[2]

REGINA *v.* WADE.

LIVERPOOL ASSIZES. 1844.

[*Reported* 1 *Carrington & Kirwan*, 739.]

THE prisoners Wade and Kenyon were indicted for having broken and entered the house of Thomas Worsley at Warrington, and having stolen therefrom one watch, two handkerchiefs, and other articles his property, the prisoner Leigh being indicted for receiving the watch and the handkerchiefs, knowing them to have been stolen.

The prisoners Wade and Kenyon pleaded guilty. The prisoner Leigh pleaded not guilty and was tried.

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[1] Part of the case not involving any question of receiving is omitted.

[2] *Acc.* Com. *v.* Bean, 117 Mass. 141. — ED.

It was proved by the servant of a pawnbroker that the wife of the prisoner Leigh had pledged the stolen watch on a day subsequent to the robbery, and James Jones, a constable of Warrington, also proved that he had seen all the three prisoners together, they being in custody together at Manchester, when Leigh said that he had left Kenyon's house with Kenyon before the robbery, that he had afterwards gone to Dunham (about eight miles from Manchester) and returned. Leigh was then discharged. But the witness subsequently went to Manchester again, and caused him to be again apprehended; and Leigh's wife then, in the presence of Leigh, told this witness that she had taken the watch and pawned it for 10*s*. She added that Leigh had also told her to take two handkerchiefs, and that, as she was about to go with them, a policeman came, and she left them in a cellar next door to her husband's house. Upon that information, the witness went to the cellar and found the handkerchiefs. Afterwards, when Leigh was in custody in the lockups with Wade, Leigh told the same witness that while he (Leigh) was before with Wade in the same place, Wade had told him (Leigh) that he had "planted" the watch and handkerchiefs under a flag in the soot-cellar in his (Leigh's) house; and that when he (Leigh) was discharged, as before mentioned, he had gone and taken the things, and had desired his wife to pledge the watch for as much as she could get upon it.

The watch and handkerchiefs were identified as the property of the prosecutor.

Pollock, C. B. I doubt whether, when the possession has been transferred by an act of larceny, the possession can be considered to remain in the owner. Were it so, then every receiver of stolen goods, knowing them to be stolen, would be a thief; and so on, in series from one to another, all would be thieves. If this was an act done by the prisoner (Leigh) in opposition to Wade, or against his will, then it might be a question whether it were a receiving. But if Leigh took the articles in consequence of information given by Wade, Wade telling Leigh in order that the latter might use the information by taking the goods, then it is a receiving. *Verdict, guilty.*

REGINA *v.* MILLER.

CROWN CASE RESERVED, IRELAND. 1854.

[*Reported* 6 *Cox C. C.* 353.]

Lefroy, C. J.,[1] now delivered the judgment of the court. In this case two questions have been reserved for our consideration. First, whether there was sufficient evidence that Mary Miller had received the stolen property; and, secondly, whether certain evidence regarding the former dealings between the two prisoners, to the admissibility of which no objection had been originally offered, had been left to the jury with the proper view. The evidence in support of the charge of receiving was this: the servant-maid of Mary Miller was produced as a witness, and stated that her mistress kept a public-house in the town of Fermoy. That Ellen Connors, the other prisoner, entered the shop, and went behind the counter where she was; that her mistress called her into the shop; that Connors had then the pieces of cotton in her hand, which Miller desired witness to take to the pawn office and pawn, and that she did so accordingly; that she brought back the money which she then received, and gave it, in the presence of her mistress, to Connors, who was then in the shop, but that her mistress had never, with her own hand, received any part of the money from her. The question was, whether this was a receiving of stolen goods by the mistress? It appears to us that it was virtually a receiving by Mary Miller, inasmuch as her servant, by her order and direction, received the goods from the thief, took them to the pawn office, and brought back the money to the thief. This, in our opinion, was virtually as much a receiving of stolen goods as if her own hand, and not that of her servant, had received them. No question can be raised in this case involving the necessity of those subtle distinctions taken on former occasions, with respect to the continuance of the possession of the goods in the thief, for the goods here were clearly transferred to hands which were virtually those of Mary Miller herself. No question has been reserved relative to the sufficiency of the evidence of guilty knowledge. We are of opinion that the evidence was left to the jury by the assistant barrister in the way in which it ought to have been, and therefore that his decision on both points ought to be affirmed.[2]

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[1] The opinion only is given; it sufficiently states the case.

REGINA *v.* SMITH.

CROWN CASE RESERVED. 1855.

[*Reported Dearsly C. C.* 494.]

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Edwin James, Q. C., Recorder of Brighton.

At the Quarter Sessions of the Peace for the borough of Brighton, holden at the Town Hall in the said borough, before the Recorder of the borough, on the 8th day of May, 1855, the prisoner, Thomas Smith, was indicted for feloniously receiving a stolen watch, the property of John Nelson, knowing the same to have been stolen. It was proved that John Nelson, the prosecutor, between eleven and twelve o'clock on the night of the 12th of April in this year, was in a public-house called the "Globe" in Edward Street in the said borough; he was in company with a prostitute named Charlotte Duncan, who lodged in a room of a house No. 17 Thomas Street, Brighton, which belonged to the prisoner, of whom she rented the room.

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[2] *Acc.* Reg. *v.* Rogers, 37 L. J. M. C. 83.— ED.

The prisoner and five or six other persons were present in the apartment in the Globe Inn when the prosecutor and Charlotte Duncan entered; while the prosecutor was drinking in the "Globe," his watch, being the watch named in the indictment, was taken from his person by some one who forced open the ring which secured the watch to a guard. The prosecutor heard the click of the ring and immediately missed his watch, and taxed the prisoner as the thief. A policeman was sent for and a partial search made, but the watch was not found. The prisoner was present all that time, and also a man named Hollands was present all the time. Soon after the loss of the watch the prosecutor and the girl Charlotte Duncan went together to Charlotte Duncan's room in Thomas Street. After they had been there together little more than an hour the prisoner came into the room where they were, and said to the prosecutor, "Was not you in the 'Globe,' and did not you lose your watch?" The prosecutor said, "Yes." The prisoner then said, "What would you give to have your watch back again?" Prosecutor said, "I'd give a sovereign." Prisoner then said, "Well, then, let the young woman come along with me, and I will get you the watch back again." Charlotte Duncan and the prisoner then went together to a house close by, in which the prisoner himself lived. They went together into a room in which Hollands was. This was nearly one o'clock. There was a table in the room; on first going in Charlotte Duncan saw there was no watch on the table, but a few minutes afterwards she saw the watch there. The prisoner was close to the table. She did not see it placed there, but she stated it must have been placed there by Hollands, as, if the prisoner to whom she was talking had placed it there, she must have observed it. The prisoner told Charlotte Duncan to take the watch and go and get the sovereign. She took it to the room in 17 Thomas Street, to the prosecutor, and in a few minutes the prisoner and Hollands came to that room. Hollands asked for the reward. The prosecutor gave Hollands half-a-crown, and said he believed the watch was stolen, and told him to be off. Hollands and the prisoner then left. The prisoner did not then say anything, nor did the witnesses see him receive any money. Hollands absconded before the trial. The recorder told the jury that, if they believed that when the prisoner went into the room 17 Thomas Street and spoke to the prosecutor about the return of the watch, and took the girl Duncan with him to the house where the watch was given up, the prisoner knew that the watch was stolen; and if the jury believed that the watch was then in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner for feloniously receiving the watch. The jury found the prisoner guilty, and, in answer to a question from the recorder, stated that they believed that, though the watch was in Hollands' hands or pocket, it was in the prisoner's absolute control.

Sentence was passed on the prisoner, but was respited until the opinion of the court could be taken.

The question for the opinion of the court is, if the conviction of the prisoner is proper.

This case was argued on the 2d day of June, 1855, before Lord Campbell, C. J., Alderson, B., Erle, J., Platt, B., and Crowder, J.

No counsel appeared for the Crown.

Creasy, for the prisoner.[1]

Lord Campbell, C. J. I think that the conviction was right. In the first place the direction of the learned recorder was unexceptionable. According to the decided cases as well as to the dicta of learned judges, manual possession is unnecessary. If we were to hold a contrary doctrine, many receivers must escape with impunity. Then it has been held in decided cases, including Regina *v.* Wiley, 4 Cox C. C. 412, that there may be a joint possession in the receiver and the thief; that is the *ratio decidendi* on which the judgment in that case proceeds. Then, was not there ample evidence to justify the jury in coming to the conclusion at which they arrived? I think there was. They might, it is true, have drawn a different conclusion, and have found that Smith was the thief; and if they had drawn that conclusion, he would have been entitled to an acquittal. Another inference which they might have drawn, and which would also have resulted in a verdict of not guilty, was. that Hollands being the thief, the watch remained in his exclusive possession, and that the prisoner acted as his agent in restoring the watch to the prosecutor; but the jury have come to a different conclusion, and I think they were justified in so doing. We have instances in real life, and we find it represented in novels and dramas drawn from real life, that persons are employed to commit larcenies and so deal with the stolen goods that they may be under the control of the employer. In this case Hollands may have been so employed by the prisoner, and the watch may have been under the prisoner's control, and if so, there was evidence of a possession both by Hollands and the prisoner.

Alderson, B. There was abundant evidence from which the jury might come to the conclusion at which they arrived, although there was evidence the other way.

Erle, J. The doubt in these cases has arisen as to the meaning of the word "receive," which has been supposed to mean manual possession by the receiver. In Regina *v.* Wiley, Patteson, J., says, that a manual possession, or even a touch, is not essential to a receiving, but that there must be a control over the goods by the receiver. Here the question of control was left to the jury, and they expressly found that though the watch was in Hollands' hand or pocket, it was in the prisoner's absolute control.

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[1] The argument is omitted.

PLATT, B. There was some evidence that the prisoner might have been the thief, and the prosecutor charged him with being the thief; but a search was made and the watch was not found, and it was proved that Hollands absconded before the trial; from that and the other facts of the case, the jury might well find that Hollands was the thief and the prisoner the receiver.

CROWDER, J. I also think that both the direction and the conviction were right. There was sufficient evidence that Hollands was the thief. The question is then put to the jury, Was the watch under the control of the prisoner? And they say it was. That finding is sufficient to support their verdict, and the conviction was right.

Conviction affirmed.

REGINA *v.* WOODWARD.

CROWN CASE RESERVED. 1862.

[*Reported* 9 *Cox C. C.* 95.]

CASE reserved for the opinion of the Court of Criminal Appeal. At the Quarter Sessions of the peace for the county of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labor, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6*d.* on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY.

G. Broderick, for the prisoner. This conviction, it is contended, cannot be sustained. At the trial it was not said on the part of the prosecution that the wife of the prisoner was her husband's agent in receiving the property, but that he subsequently adopted her act of receiving by paying the balance of the price agreed upon. But there was no evidence of any guilty receipt by the wife, or of any subsequent act of receiving by the prisoner. The guilty knowledge and act of receiving must be simultaneous. In Reg. *v.* Dring and Wife, 1 Dears. & Bell, 329; 7 Cox Crim. Cas. 382, where a husband and wife were jointly indicted for receiving stolen goods, and the jury found both guilty, stating that the wife received them without the control or knowledge of and apart from her husband, and that he afterwards adopted her receipt, it was held that the conviction could not be sustained as against the husband; and in his judgment, Cockburn, C. J., observed that, "If we are to take it that the jury meant to say, 'We find the prisoner guilty if the court should be of opinion that upon the facts we are right,' then we ought to be able to see that the prisoner took some active part in the matter, that the wife first received the goods and then the husband from her, both with a guilty knowledge." [BLACKBURN, J. The verdict in this case is, that he did receive them: there is no question raised as to whether the verdict was justified. ERLE, C. J. Receiving is a very complex term. There is the case where two persons stole fowls, and took them for sale in a sack to another person, who knew them to have been stolen. The sack was put in a stable and the door shut, while the three stood aside haggling about what was to be paid for them. There the judges differed as to whether there was a receiving by the third person in whose stable the sack was put.] That was the case of Reg. *v.* Wiley, 4 Cox Crim. Cas. 412. The actual receipt of the goods was by the wife, and it is consistent with the evidence that the goods may never have come into the prisoner's possession at all. (The case of Reg. *v.* Button, 11 Q. B., 3 Cox Crim. Cas. 229, were also cited.)

ERLE, C. J. The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing in the nature of a complete receipt of the goods until the thief found the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.

Blackburn, J. The principal felon left the stolen property with the wife as the husband's servant, but the court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

Keating, J. I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

Wilde, B. I read the case as showing that the wife received the goods on the part of the prisoner her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of Reg. *v.* Dring and Wife, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

Mellor, J., concurred. *Conviction affirmed.*

SECTION II.

Stolen Property.

REGINA *v.* DOLAN.

Crown Case Reserved. 1855.

[*Reported* 6 Cox C. C. 449; *Dearsly C. C.* 436.]

The following case was stated by M. D. Hill, Esq., Q. C., Recorder of Birmingham: —

At the Sessions held in Birmingham, on the 5th day of January, 1855, William Rogers was indicted for stealing, and Thomas Dolan for receiving, certain brass castings, the goods of John Turner. Rogers pleaded guilty, and Dolan was found guilty.

It was proved that the goods were found in the pockets of the prisoner Rogers by Turner, who then sent for a policeman, who took the goods and wrapped them in a handkerchief, Turner, the prisoner

Rogers, and the policeman going towards Dolan's shop. When they came near it the policeman gave the prisoner Rogers the goods, and the latter was then sent by Turner to sell them where he had sold others; and Rogers then went into Dolan's shop and sold them and gave the money to John Turner as the proceeds of the sale. Upon these facts it was contended on the part of Dolan that Turner had resumed the possession of the goods, and that Rogers sold them to Dolan as the agent of Turner, and that consequently at the time they were received by Dolan, they were not stolen goods within the meaning of the statute.

I told the jury, upon the authority of the case of Regina *v.* Lyons and another, C. & M. 217, cited by the counsel for the prosecution, that the prisoner was liable to be convicted of receiving, and the jury found him guilty.

Upon this finding I request the opinion of the Court of Appeal in Criminal Cases on the validity of Dolan's conviction.

Dolan has been sent back to prison, and I respited judgment on the conviction against him until the judgment of the court above shall have been given.

O'Brien, for the prisoner. This conviction cannot be sustained. The objection is, that when the goods reached the hands of Dolan they were not stolen goods. They had been restored to the possession of the owner, and the sale to the prisoner was with the owner's authority.

LORD CAMPBELL, C. J. There seems to be great weight in that objection but for the authority of the case cited. It can hardly be supposed that if goods were stolen seven years ago, and had been in the possession of the owner again for a considerable period, there could be a felonious receipt of them without a fresh stealing.

O'Brien. That was the view taken by the learned recorder; and R. *v.* Lyons, C. & M. 217, which was cited for the prosecution, does not appear to have been a case much considered. Coleridge, J., in that case, said, that for the purposes of the day, he should consider the evidence as sufficient in point of law to sustain the indictment, but would take a note of the objection.

COLERIDGE, J. I certainly do not think so to-day.

O'Brien. There is also a slight circumstance of distinction between that case and the present. It does not appear in that case that the stolen property was ever actually restored to the hands of the owner, nor that he expressly directed the thief to take it to the prisoner. (He was stopped.)

Beasley, for the prosecution. R. *v.* Lyons is expressly in point, and the learned judge who decided it does appear to have had his attention recalled to the point after the conviction, and still, upon deliberation, to have thought there was nothing in the objection. The facts are thus stated in the marginal note: "A lad stole a brass weight from his master, and after it had been taken from him in his master's presence it was restored to him again with his master's consent in order that he might sell it to a man to whom he had been in the habit of selling similar articles which he had stolen before. The lad did sell it to the man; and the man being indicted for receiving it of an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced to be transported seven years." The report adds that after the sentence, "the matter was subsequently called to his Lordship's attention by the prisoner's counsel, yet no alteration was made in the judgment of the court; from which it is to be inferred that, upon consideration, his Lordship did not think that in point of law the objection ought to prevail." The present is, however, a stronger case than that; because here in truth the master did not recover possession of the stolen goods. They were in the hands of the police; and what the master did must be considered as done under the authority of the police.

Lord Campbell, C. J. No; the policeman was the master's agent.

Platt, B. And the sale was by direction of the master.

Beasley. The statute does not require that the receipt should be directly from the thief. It only requires that the prisoner should receive stolen goods, knowing them to have been stolen; and that is proved in this case. In many cases it has been held that where the owner of property has become acquainted with a plan for robbing him, his consent to the plan being carried out does not furnish a defence to the robbers. R. *v.* Eggington, 2 B. & P. 508.

Lord Campbell, C. J. But to constitute a felonious receiving, the receiver must know that at that time the property bore the character of stolen property. Can it be said that, at any distance of time, goods which had once been stolen would continue to be stolen goods for the purpose of an indictment for receiving, although in the mean time they may have been in the owner's possession for years?

Cresswell, J. The answer to that in this case seems to be that the policeman neither restored the property nor the possession to the master; that the goods were in the custody of the law; and that the master's presence made no difference in that respect.

Beasley. That is the argument for the prosecution; and it is manifest that if the policeman had dissented from the plan of sending Rogers to Dolan's shop, the master could not have insisted upon the policeman giving up the property to him.

Lord Campbell, C. J. I feel strongly that this conviction is wrong. I do not see how it can be supported, unless it could be laid down that, if at any period in the history of a chattel once stolen, though afterwards restored to the possession of the owner, it should be received by any one with a knowledge that it had been stolen, an offence would be committed within the statute. I think that that would not be an offence within the statute any more than it would make the receiver an accessory to the felony at common law. If the article is restored to the owner of it, and he, having it in his possession, afterwards bails it to another for a particular purpose of delivering it to a third person, and that third person receives it from that bailee, I do not see how it can, under these circumstances, be feloniously received from that bailee. Then what are the facts here? [His Lordship stated the facts as above.] Turner, the owner, therefore had, I think, as much possession of the goods as if he had taken them into his own hands, and with his own hands delivered them to another person for a particular purpose, which was performed. He was, subsequent to the theft, the bailor and the other person was the bailee of the goods. Then they were carried to the prisoner by the authority of the owner; and I cannot think that under those circumstances there was a receiving within the statute. As to the case cited, I cannot help thinking that the facts cannot be quite accurately stated, and that there was something more in that case than appears in the report; but if not, I am bound to say that I do not agree in that decision.

Coleridge, J. I have no recollection of the case cited, and I have no right, therefore, to say that it is not accurately reported; but, assuming it to be so, I am bound to say that I think I made a great mistake there. What is the case? If for a moment the interference of the policeman is put out of the question, the facts are, that the goods which had been stolen were restored to the possession of the real owner and were under his control, and having been so restored, they were put again into the possession of Rogers for a specific purpose, which he fulfilled. It seems then to me that when, the second time, they reached the hands of Rogers, they had no longer the character of stolen goods. Then, if that would be the case, supposing the policeman to be out of the question, does the interference of the policeman according to the facts here stated make any difference? I think not. It is the master who finds the goods and sends for a policeman; and it is by the authority of the master that the policeman takes and keeps the goods, and afterwards hands them back to Rogers. Indeed, it seems to me that all that was done was done by Turner's authority; and that it must be considered that the property was under the control of the real owner when he sent Rogers with them tc the prisoner. In this state of facts, the interference of the policeman seems to me of no importance.

Cresswell, J. I do not dissent from the decision that this conviction is wrong; but as we are called upon in this court to give the reasons of our judgment, I must say that I cannot concur in all the reasons which I have heard given in this case. If it had been necessary to hold that a policeman, by taking the stolen goods from the pocket of the thief, restores the possession to the owner, I should dissent. I think that we cannot put out of question the interference of the policeman; and that whilst the goods were in his hands they were in the custody of the law; and that the owner could not have demanded them from the policeman or maintained trover for them. But as the case finds that the policeman gave them back to Rogers, and then the owner desired him to go and sell them to Dolan, I think that Rogers was employed as an agent of the owner in selling them, and that consequently Dolan did not feloniously receive stolen goods.

Platt, B. I am of the same opinion. The case is, that the stolen goods were found by the owner in the pocket of the thief. They were restored to his possession, and it does not appear to me very material whether that was done by his own hands or by the instrumentality of the policeman. Things being in that state, it seems to have come into their heads that they might catch the receiver; and it was supposed that by putting the stolen property back into the custody of Rogers, they could place all parties *statu quo* they were when the property was found in the pocket of Rogers; but I agree with the rest of the court that the Act of Parliament does not apply to a case of this kind; for if it did, I see no reason why it should not equally apply to restored goods stolen ten years ago.

Williams, J. The reason why I think the conviction wrong is, that the receipt, to come within the statute, must be a receipt without the authority of the owner. Looking at the mere words of the indictment, every averment is proved by this evidence; but then the question is, whether such a receipt was proved as is within the statute, namely, a receipt without the owner's authority; and here Rogers was employed by the owner to sell to Dolan. *Conviction quashed.*[1]

REGINA *v.* SCHMIDT.

Crown Case Reserved. 1866.

[*Reported* 10 Cox C. C. 172; *Law Reports*, 1 *Crown Cases Reserved*, 15.]

Case reserved for the opinion of this court by the deputy-chairman of the Quarter Sessions for the western division of the County of Sussex.

John Daniels, John Scott, John Townsend, and Henry White were indicted for having stolen a carpet-bag and divers other articles, the property of the London, Brighton, and South Coast Railway Company; and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen.

The evidence adduced before me as deputy-chairman of the Court of Quarter Sessions at Chichester, for the western division of the County of Sussex, on the 20th October, 1865, so far as relates to the question I have to submit to the Court of Criminal Appeal, was as follows: —

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[1] *Acc.* Reg. *v.* Hancock, 14 Cox C. C. 119; U. S. *v.* De Bare, 6 Biss. 358. — Ed.

On the 29th July, 1865, two passengers by the prosecutors' line of railway left a quantity of luggage at the Arundel station, which luggage was shortly afterwards stolen therefrom.

On the 30th July a bundle containing a portion of the stolen property was taken to the Angmering station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed "Mr. F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton, in the usual course, on Sunday morning, the 30th.

Meanwhile the theft had been discovered, and shortly after the bundle had reached the Brighton station, a policeman (Carpenter) attached to the railway company, opened it, and having satisfied himself that it contained a portion of the property stolen from the Arundel station, tied it up again, and directed a porter (Dunstall) in whose charge it was, not to part with it without further orders.

About 8 P. M. of the same day (Sunday, 30th), the prisoner John Scott went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Angmering station in the name of Schmidt, Waterloo Street. Dunstall replied "No." Scott then said, "It is wrapped up in a silk handkerchief, and is directed wrong; it ought to have been directed to 22 Cross Street, Waterloo Street." Dunstall, in his evidence, added, "I knew the parcel was at the station, but I did not say so because I had received particular orders about it."

The four male prisoners were apprehended the same evening in Brighton on the charge, for which they were tried before me and convicted.

On Monday morning, the 31st July, the porter (Dunstall), by the direction of the policeman (Carpenter) took the bundle to the house No. 22 Cross Street, Waterloo Street, occupied as a lodging-house and beer-house by the female prisoner and her husband (who was not at home or did not appear), and asked if her name was Schmidt, on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the town hall.

All the prisoners were found guilty, and I sentenced each of them to six months' imprisonment with hard labor. They are now in Petworth jail in pursuance of that sentence.

At the request of the counsel for the female prisoner I consented to reserve for the opinion of this court the question, —

Whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property, so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute. HASLER HOLLIST.

Pearce (*Willoughby* with him), for the prisoner. The conviction is wrong. To support a conviction for receiving stolen goods, it must appear that the receipt was without the owner's authority. In this case, in consequence of the conduct of the railway company, the property had lost its character of stolen property at the time it was delivered at the receiver's house by the railway porter. The property is laid in the indictment as the property of the railway company, and Carpenter was not an ordinary policeman, but, as the case states, a policeman attached to the railway company. He opens the bundle, and finding therein some of the stolen property, he gives it to Dunstall, and orders it to be detained until further orders, and in the meantime the thieves were arrested; Carpenter then directs Dunstall to take the bundle to the receiver's house, so that the receiver got the stolen property from the railway company, who alone on this indictment are to be regarded as the owners of the property. The railway company, the owners, having got their property back, make what must be considered a voluntary delivery of it to the receiver. The case is similar to Regina *v.* Dolan, 6 Cox C. C. 449; 1 Dears. C. C. 436, where, stolen goods being found in the pockets of the thief by the owner, who sent for a policeman, and then, to trap the receiver, the goods were given to the thief to take them to the receiver's, which he did, and the receiver was afterwards arrested, it was held that the receiver was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner. In that case Regina *v.* Lyons, C. & M. 217, was expressly overruled. Lord Campbell, C. J., said, in Regina *v.* Dolan, "If an article once stolen has been restored to the owner, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the Act of Parliament?"

Hurst, for the prosecution. Unless this case is distinguishable from Regina *v.* Dolan, the conviction, it must be conceded, is wrong. But the facts of this case are more like the view taken by Cresswell, J., in Regina *v.* Dolan, "That while the goods were in the hands of the policeman, they were in the custody of the law; and the owner could not have demanded them from the policeman, or maintained trover for them." In that case the real owner intervened, and had manual possession of the stolen goods; here he does not. The goods belonged to the railway passenger, and the company are only bailees. [MELLOR, J. The policeman merely opened the bundle in the course of its transit to see what was in it, and then sent it according to its direction. It was in the hands of the policeman, not of the company. ERLE, C. J. Suppose a laborer steals wheat, and he sends it by a boy to his accomplice, and the policeman stops the boy, ascertains what he has got, then tells him to go on, and follows and apprehends the accomplice, is not the accomplice guilty of feloniously receiving? MELLOR, J. Here the policeman does nothing to alter the destination of the bundle. The element of the real owner dealing with the stolen property is wanting in this case. KEATING, J. Scott directs the address to be changed.] The bundle was sent by the thieves through the railway company to the receivers; the real owner had nothing to do with this part of the transaction. [LUSH, J. If the true owner had sued the company for the property, the company could not have justified detaining or converting it.] If a policeman knows of stolen goods being in the hands of an innocent agent, and does not take possession for the owner, and the innocent agent, by the policeman's directions, delivers them to a receiver, that does not prevent the receiver being guilty of feloniously receiving.

Pearce, in reply. Before the bundle was sent out for delivery the thieves were in custody, and having secured them, Carpenter then gives orders for the bundle to be delivered to the receiver. Carpenter was the servant of the railway company, who are the owners for the purpose of this indictment, and the delivery therefore was by the owners.

[ERLE, C. J., and MELLOR, J., were of opinion that the conviction was right, but MARTIN, B., KEATING, and LUSH, JJ., held the conviction wrong. In consequence of the prisoner having suffered half the term of imprisonment from inability to get bail and the further unavoidable delay, the case was not sent to be argued before all the judges.]

MARTIN, B. I think that this conviction was wrong on two grounds, the one substantial, the other formal. I think that Mr. Pearce's argument, founded on the indictment, that the property is there laid to be property of the railway company, is well founded; and it seems to me that Dolan's case applies to this.

ERLE, C. J. I am of opinion that the conviction was right. The question is whether, at the time this stolen property was received by the prisoner, it was the property of the London and Brighton Railway Company; and if so whether, when the policeman Carpenter caused the delivery to be stopped for the purpose of detecting the parties implicated, it thereby lost the character of stolen property. If it had lost the character of stolen property at the time it was received by the prisoner, the receiving by her will not amount to felony. But in this case I think that the railway company, when they took this bundle into their possession, were acting as bailees of the thief, and were innocent agents in forwarding it to the receiver, and that the things did not lose their character of stolen property by what was done by the policeman.

KEATING, J. I agree with my brother Martin that the conviction was wrong. It seems conceded, on the authority of Dolan's case, that if the property had got back again for any time into the hands of the true owner, the conviction would be wrong. It is said that, in this case, the owners mentioned in the indictment, the railway company, were not the real owners, whereas in Dolan's case the real owner intervened. But I think there is no distinction in principle between this case and that. The railway company are alleged in the indictment to be the owners of the property, and we sitting here can recognize no other persons than them; they are the owners from whom the property was stolen, and it got back to their possession before it was received by the prisoner. I can see no real distinction between this case and Dolan's. All the reasons given for the judgment in that case apply equally to the case of the ownership in this case. The principle I take to be, that when once the party having the right of control of the property that is stolen gets that control, the transaction is at an end, and there can be no felonious receipt afterwards. I think the test put by my brother Lush in the course of the argument, as to the real owner suing the railway company for the property after they had got the control of it, is decisive of the matter.

Mellor, J. I agree entirely with my brother Erle, C. J., and think the conviction was right. The indictment rightly alleges the property to have been in the railway company at the time it was stolen; they had the bailment of it from the true owner. Then it is stolen while in their custody, and the next step is, the thieves afterwards send a portion of it by the same railway company to be forwarded to the receiver at Brighton; so that the railway company get possession of this part from the thieves under a new bailment. Then the policeman examines the property and directs it not to be forwarded until further orders; but this was not done with the view of taking possession of it or altering its transit, but merely to see whether it was the stolen property. I agree with Dolan's case, but in the present case I think the stolen property had not got back to the true owner.

Lush, J. I agree with my brothers Martin, B., and Keating, J., and think that the conviction was wrong. I think that the goods had got back to the owner from whom they had been stolen. Had the railway company innocently carried the goods to their destination and delivered them to the prisoner, the felonious receipt would have been complete; but while the goods are in their possession, having been previously stolen from them, the goods are inspected, and as soon as it was discovered that they were the goods that had been stolen, the railway company did not intend to carry them on as the agents of the bailor; the forwarding them was a mere pretence for the purpose of finding out who the receiver was. It was not competent to the railway company to say, as between them and the original bailor, that they had not got back the goods. They were bound to hold them for him. In afterwards forwarding the goods to the prisoner, the company was using the transit merely as the means of detecting the receiver.

Martin, B. I only wish to add that I meant to say that I think the conviction wrong in substance in consequence of the interference of the policeman with the property, and this independently of the form of indictment. *Conviction quashed.*[1]

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[1] *Acc.* Reg. *v.* Villensky, [1892] 2 Q. B. 597. — Ed.

REGINA *v.* CARR.

CENTRAL CRIMINAL COURT. 1877.

[*Reported* 15 *Cox C. C.* 131 *n.*]

JOHN CARR was indicted for stealing 168 bonds of the Peruvian Government, the property of Lionel Cohen and others; second count for feloniously receiving the same.

There were other counts charging him as an accessary before and after the fact.

The *Solicitor General* and *Poland* were counsel for the prosecution, and *Besley* and *Grain* for the defence.

The bonds in question, on the 2d June, 1877, were transmitted by the prosecutors to a customer in Paris. They were traced safely as far as Calais and were stolen from the train after leaving that place.

On the 4th of September the prisoner was found dealing with them in London, and the question arose as to the jurisdiction of this court to try the case, the robbery having been committed in France.

The *Solicitor General* submitted that the prosecutors never having parted with their property in the bonds, they were still under the protection of the law, and that the subsequent possession of the bonds in this country was sufficiently recent to enable the jury to find a verdict of larceny against a person who was dishonestly dealing with them here. The decision in Rex *v.* Prowes, 1 Moody C. C. 349, was certainly opposed to this view; but no reasons were given for that judgment, and a doubt as to the soundness of the decision was expressed by Parke, B., in Regina *v.* Madge, 9 C. & P. 29. The case of Regina *v.* Debrueill, 11 Cox C. C. 207, was referred to. As to the counts charging the prisoner with receiving, and also as an accessary, the 24 & 25 Vict. c. 94 contemplated a case of this kind, where the original offence was committed abroad.

Besley relied on the decision in Rex *v.* Prowes, *ubi sup.*, and Regina *v.* Hogetoran, Cent. Crim. Court Sess. Paper, vol. 79, 268, and Regina *v.* Nadal, 84 Cent. Crim. Court Sess. Paper, 295.

DENMAN, J. There can be no doubt that this was a larceny fully completed in France. I do not at all say that it might not be a very reasonable thing that any one afterwards dealing here with property so stolen might make cogent evidence of having received them knowing them to have been stolen, just as much as if they had been stolen in England; but it appears to me that the point has been too solemnly decided for me to give the go-by to those decisions. It has been solemnly decided and acted upon so often that there is no jurisdiction in England to try a case where the stealing has been committed abroad, either against the principal or the accessory, that I have nothing to do but to act upon those decisions and to direct an acquittal in this case.

I entertain no doubt that the case of Rex *v.* Prowes, *ubi sup.*, is directly in point, and Regina *v.* Madge, *ubi sup.*, fortifies it to the extent of recognizing and acting upon it. Debrueill's case also decides that a conviction of receiving under similiar circumstances could not be sustained. The prisoner must therefore be acquitted.

STATE *v.* IVES.

SUPREME COURT OF NORTH CAROLINA. 1852.

[*Reported* 13 *Iredell*, 338.]

APPEAL from the Superior Court of Law of Currituck County, at the fall term, 1851, his honor Judge Settle presiding.

The defendant was indicted for receiving stolen goods, and was convicted upon the following counts in the bill of indictment: —

5th count. And the jurors, etc., do further present, that the said Josiah Ives, afterwards, to wit, on the 1st day of February, A. D. 1851, in the county aforesaid, with force and arms, one bale of cotton, of the value of ten shillings, and one barrel of tar, of the value of six shillings, of the goods and chattels of said Caleb T. Sawyer, before then feloniously stolen, taken, and carried away, feloniously did receive and hire, he, the said Josiah Ives, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

6th count. And the jurors, etc., do further present, that, at and in the county aforesaid, on the 1st day of March, 1851, certain goods and chattels, to wit, one bale of cotton, of the value of ten shillings, and one barrel of tar, of the value of six shillings, of the goods and chattels of Caleb T. Sawyer, feloniously were stolen, taken, and carried away, by some person to the jurors unknown; and that the said Josiah Ives, afterwards, to wit, on the 2d day of March, 1851, in the county aforesaid, the said bale of cotton and the said barrel of tar feloniously did have and receive, he, the said Josiah Ives, on the day and year last aforesaid, in the county aforesaid, well knowing the said bale of cotton and the said barrel of tar to have been theretofore feloniously stolen, taken, and carried away, contrary to the form of the statute in such case, made and provided, and against the peace and dignity of the State.

There was a motion in arrest of judgment, which was overruled. Judgment against the defendant, from which he appealed to the Supreme Court.

PEARSON, J. The defendant was convicted upon the fifth and sixth counts in the bill of indictment; and the case is here upon a motion in arrest of judgment. The fifth count was abandoned by the Attorney General, and the question is upon the sixth count.

A receiver of stolen goods is made an accessary by the statute of Anne; and it is provided, by another section of that statute, that, if the principal felon escapes and is not amenable to the process of the law, then such accessory may be indicted, as for a misdemeanor. This statute was so construed as to require, in the indictment for a misdemeanor, an averment that the principal felon was not amenable to the process of the law. Foster, 373. Our statute, Rev. Stat. c. 34, §§ 53 and 54, is taken from the statute of Anne, and has received a similar construction. Groff's case, 1 Mur. 270, and see the remarks of Henderson, judge, in Good's case, 1 Hawks, 463.

The objection taken to the indictment, is the absence of an averment, that the principal felon is not amenable to the process of the law; and it is insisted that, as the principal felon is alleged to be some person to the jurors unknown, it could not be averred that he had "escaped and eluded the process of the law," in the words used by our statute, and it was urged that the statute did not apply to a case of the kind.

The Attorney General in reply took the position, that the averment that the principal felon was some person to the jurors unknown, necessarily included and amounted to an averment, that he had escaped and eluded the process of the law, so as not to be amenable to justice. This would seem to be so; but we give no definite opinion, because there is another defect in the count, which is clearly fatal.

After averring that the cotton and tar had been stolen by some person to the jurors unknown, the indictment proceeds: "Afterwards, etc., the said Josiah Ives, the said bale of cotton and the said barrel of tar feloniously did have and receive, well knowing the said bale of cotton and barrel of tar to have been theretofore feloniously stolen," etc. There is no averment from whom the defendant received the cotton and tar. We cannot imply that he received them from the person who stole them. It may be that he received them from some third person; and this question is presented: A. steals an article, B. receives it, and C. receives it from B. Does the case fall within the statute? We think not. The statute obviously contemplates a case where goods are received from the person who stole them; he is termed the principal felon. In the case put above, A. is the principal felon, B. is his accessory, but C. is a receiver from a receiver, — an accessory of an accessory. In fact, it cannot be said whether A. or B. is the principal felon in regard to him.

The statute does not provide for such a case. It makes the receiver an accessory; and in case the principal is not amenable to the process of law, such accessory may be prosecuted as for a misdemeanor. Consequently it is necessary to point out the principal, and the matter is involved in the doctrine of "principal and accessory." This and many other omissions are, in England, remedied by the statutes, W. III. and G. II., by which "the act of receiving" is made a substantive felony, without reference to the person who stole or the person from whom the goods are received. Under those statutes, the fifth count, which the Attorney General has properly abandoned, would be good; for the offence is to "receive and have" stolen goods. We have not adopted those statutes. Of course the decisions and forms in the modern English books cannot aid us. Duncan's case, 6 Ired. 98, presents another instance, to provide for which we have no statute.

Per Curiam. Judgment below reversed, and judgment arrested.[1]

SECTION III.

Guilty Knowledge.

REGINA *v.* ADAMS.

Bristol Assizes. 1858.

[*Reported* 1 *Foster & Finlason*, 86.]

Larceny and Receiving. The woman was charged with having stolen, and the man (her husband) with having received, eleven mining tools. The evidence was that the woman had picked them up from a rubbish-heap, where they had been placed (not as rubbish), on the premises of the prosecutor, and delivered them to the man, telling him how she had obtained them, and that he had sold them as old iron.

Crowder, J. (*to the jury*), after stating to them the law as to the duty of a finder of property, as applicable to the charge against the woman, and leaving the case as against her with them: Before you can convict the man you must be satisfied that he knew that the goods had been stolen. It may be that he did not know (upon the law as I have laid it down, as to the duty of the finder of property to take proper means to find the owners) that this was a theft.[2] If so, he cannot be guilty of receiving with a guilty knowledge of the goods being stolen.

Both guilty; recommended to mercy; fourteen days' imprisonment.

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[1] See Rex v Messingham, 1 Moo. C. C. 257, Reg. v. Reardon, L. R. 1 C. C. R. 31. — Ed.

[2] That is, it is apprehended that the other prisoner had not taken proper means to find the owner. — Rep.

REGINA *v.* WHITE.

WINCHESTER ASSIZES. 1859.

[*Reported* 1 *Foster & Finlason*, 665.]

RECEIVING. The prisoner was charged with receiving lead, the property of the Queen, he well knowing it to have been stolen.

BRAMWELL, B. (*to the jury*). The knowledge charged in this indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances were such, accompanying the transaction, as to make the prisoner believe that it had been stolen. *Guilty.*

COMMONWEALTH *v.* LEONARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[*Reported* 140 *Massachusetts*, 473.]

INDICTMENT in three counts. The first count alleged that on July 1, 1883, certain articles, the goods, chattels, and property of the Boston and Lowell Railroad Corporation, were feloniously stolen, and that the defendant afterward, on the same day, "the goods, chattels, and property aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in the concealment of the same," he "well knowing the said goods, chattels, and property to have been feloniously stolen, taken, and carried away."

The second and third counts were similar in form, but the property was in each differently described and at a different date, namely, on August 1, 1883, and September 1, 1883, respectively.[1]

The defendant asked the judge to instruct the jury as follows: "1. If the jury are not satisfied beyond a reasonable doubt that the accused knew that the goods were stolen he is entitled to an acquittal. 2. To justify a conviction it is not sufficient to show that the accused had a general knowledge of the circumstances under which the goods were stolen, unless the jury are also satisfied that he knew that the circumstances were such as constituted larceny."

The judge refused to give these instructions, and upon the matters embraced therein instructed the jury as follows: —

"He must know that the goods were stolen, but he does not need to know the hour nor day they were stolen; he must undoubtedly have notice which would put him on his guard as knowledge that the goods were acquired and turned over to him by a person not taking them by mistake, not by right, but taking them as thieves take them, that is, for the purpose of defrauding the railroad and cheating them out of their property."

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[1] Part of the case, not involving a question of guilty knowledge, is omitted.

The defendant's counsel here suggested "by larceny," and the judge gave this further instruction: —

"By the taking and carrying away of property it is the fraudulent taking away of the property of another for the purpose of converting it to the taker's use to deprive the owner of it. These goods must have been taken that way and were stolen goods; they must have been taken by McCarthy as thieves take them, not by mistake or accident, or by taking from those who had no right to give, but taking when he knew that he had no right to take them."

The jury returned a verdict of guilty on the third count, and of not guilty on the other counts, and the defendant alleged exceptions.

Field, J. The offence of receiving stolen property, knowing it to have been stolen, must be considered as distinct from the offence of receiving embezzled property knowing it to have been embezzled, Pub. Sts. c. 203, §§ 48, 51, although embezzlement under our statutes has been held to be a species of larceny. Commonwealth *v.* Pratt, 132 Mass. 246. The punishments of the two offences may be different, as the offence of receiving embezzled goods may be punished by a fine without imprisonment. If the property had actually been stolen, a belief on the part of the defendant that it had been stolen is tantamount to knowledge. If the defendant knew all the facts and the facts constituted larceny as distinguished from embezzlement, it would be no defence that the defendant thought that the facts constituted embezzlement. If the defendant did not know the facts, but believed from the circumstances that the property had been either embezzled or stolen, and it had been actually stolen, it was competent for the jury to find the defendant guilty of the offence charged. The second request for instructions was therefore rightly refused.

The first request for instructions states the law with substantial correctness. It is contended that the instructions given on this point, rightly construed, are the same in effect. We find it unnecessary to decide whether the case called for a more careful definition of larceny as distinguished from embezzlement or from wilful trespass.

Exceptions sustained.[1]

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[1] See Reg. *v.* Rymes, 3 C. & K. 326. — Ed.

CHAPTER XII.

CRIMES AGAINST THE DWELLING-HOUSE.

SECTION I.

Burglary.

STAUNFORD, Pleas of the Crown, 30 *a*. Burglars are those who feloniously in time of peace break houses, churches, walls, towers, or gates, for which burglary they shall be hanged, though they took nothing away. *Ut patet* tit. Coron. in Fitz. p. 264, p. 185, & p. 178. But yet they ought to have felonious intent to rob or kill or do other felony. For if a man be indicted *quod domum I. S. felonice fregit ad ipsum verberandum*, that is only trespass, for by this his intent in the breaking is made known. It is otherwise if it be *domum fregit ad ipsum interficiendum*. &c. But if a man be indicted *quod clausum I. S. felonice fregit ad ipsum interficiendum*, that is not burglary, per HANKFORD & HILL, M. 13 H. 4, f. 7. The same is law if he break the house and do not enter into it. *Et nota* that for anything contained in those books, burglary may be done as well by day as by night, &c. But the law is not so taken, for all the indictments for burglary are *quod noctanter fregit*. &c. *Vide* Britton for burglars, fo. 17; for I do not remember that I have read anything of it in *Bracton*, save that he speaks in one place in this way, scil. "*Si quis homsoken, quae dicitur invasio domus contra pacem, in domo suo defenderit & invasor occisus fuerit impersequutus. & inultus remanebit, dum tamen ille qui invasus est, aliter se defendere non potuit. Quia dicitur non est dignus pace qui non vult servare eam*," &c.

1 Hawk. P. C. ch. 17, Sects. 1, 2, 3, 11, 18, 21. Burglary is a felony at the Common Law, in breaking and entering the mansion-house of another, or (as some say) the walls or gates of a walled town in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not.

There are some opinions, that burglary may be committed at any time after sun-set and before sun-rising; but it seems the much better opinion that the word *noctanter*, which is precisely necessary in every indictment for this offence, cannot be satisfied in a legal sense, if it appear upon the evidence, that there was so much daylight at the time that a man's countenance might be discerned thereby.[1]

Notwithstanding some loose opinions to the contrary, there seems to be no good cause to doubt but that both [an actual entry and breaking] are required to complete this offence; for the words *fregit* and *intravit* being both of them precisely necessary in the indictment, both must be satisfied. And *a fortiori* therefore there can be no burglary where there is neither of them; as if on a bare assault upon a house, the owner fling out his money.

Any the least entry either with the whole, or but with part of the body, or with any instrument. or weapon, will satisfy the word *intravit* in an indictment of burglary; as if one do but put his foot over a threshold, or his hand or a hook or pistol within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c.

A house wherein a man dwells but for part of the year . . . . may be called his dwelling-house; and will sufficiently satisfy the words *domus mansionalis* in the indictment, whether any person were actually therein or not, at the time of the offence.

All out-buildings, as barns, stables, dairy-houses, &c., adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them.

ANONYMOUS.

LENT ASSIZES. 1554.

[*Reported Dyer*, 99*a*, *pl.* 58.]

ONE was indicted for that he *burglariously broke open* a church in the night in order to destroy and steal the goods of the parishioners therein being, but took nothing away. And BROMELEY, J., held clearly that this is burglary; but he said that it ought to be *broke and entered*.

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[1] In Com. *v.* Chevalier, 7 Dane Abr. 134 (1794) the jury found that a breaking was not in the night which took place at eighteen minutes after two o'clock on the morning of June 27th.

Mass. Pub. Stats. ch. 214, sect. 15. When an offence is alleged to have been committed in the night-time, the time called night-time shall be deemed to be the time between one hour after the sun-setting on one day and one hour before sun-rising on the next day.

RESOLUTION.

All the Judges of England. 1584.

[*Reported Anderson*, 114.]

All the justices assembled at Serjeants' Inn agreed that if one break the glass in a window in the dwelling-house of any one, and there with hooks draw carpets out, and feloniously steal them, it is burglary if it be done at night, though the man who does it do not enter or break the house otherwise; and this case was put for a purpose, in order that the justices of Assize in the county of Warwick might know the law before the Assizes, where this case was to come in question for an offence committed at Erdeburgh in said county. At this time the following case was also put by the said justices, that thieves in the night come to a dwelling, and some one within comes and opens the door, and when it is open, one of the thieves intending to kill the man shoots at him with a gun, the bullet from which misses the man and breaks the wall on the other side of the house. And it was agreed by all that this is no burglary; and this also was in order to know the law in this case, which happened in the county of Derby where they were also justices. And as bearing upon these cases an actual case was put, which was this, scil.: In the night one who intended to kill another in a house broke a hole in the wall of the dwelling, and perceiving where the person was, shot at him through the hole with a gun and missed the person, which was adjudged as burglary: so where one broke a hole in the wall and seeing a man with a purse of money hanging from his girdle coming by the hole, snatched at the purse and took it, this too was agreed to be burglary; which happened in Essex. And then it was remembered that one went to the window of Mr. Cave's study in the county of Leicester, and perceiving a casket with money in it, drew it to the window and took money out of it, and for this he was hanged in the county of Leicester. For in all these cases of burglary there is a breaking of the house to commit felony in the night; which makes the offence burglary. But in the preceding case of shooting with the gun into the door and breaking the wall with the bullet, it is not a breaking of the house with intent to commit felony; wherefore it is not burglary.

ANONYMOUS.

Crown Case Reserved. 1594.

[*Reported Moore*, 660, *pl.* 903.]

It was resolved by all the justices at Serjeants' Inn, that the breaking of a dwelling-house at night with intent to rob or kill a man is burglary, though no one be in the house. And if one has two dwelling-houses where he lives in turn, if a thief break at night the house from which he is absent it is burglary, and all the old precedents of indictments for burglary are *noctanter et felonice*, without allegation of any person put in fear of death. And the reason of the old precedents varying from those of modern times by mentioning that one was in fear of death is because the Statute 23 H. 8 takes away clergy from a burglar where any one is put in fear of death, but not otherwise.

REX *v.* FIDLING.

King's Bench. 1607.

[*Manuscript.*[1]]

One Fidling was indicted for burglary; and the indictment was that he the mansion house of A *felonie fregit*, and him and all his family put in terror of their lives, with intention the said A *de bonis et pecuniis spoliandis.* Exception was taken to this indictment, because it said only *fregit* and not *intravit*, according to the opinion of Bromeley in 1 Mary, Dy. fo. 99, pl. 58. But *per Curiam;* The indictment is good enough; for if he breaks the house feloniously with intent *ut supra* it is burglary, although he does not enter.

It was also objected that *intentione ad spoliandum* shall be taken only as a trespass; but *per Curiam*, felony *ad spoliandum* shall be taken to be a felony.

LE MOTT'S CASE.

About 1650.

[*Reported Kelyng*, 42.]

At the Sessions I inquired of Le Mott's Case, which was adjudged in the time of the late troubles, and my Brother Wyld told me that the case was this: That thieves came with intent to rob him, and finding the door locked up, pretended they came to speak with him, and thereupon a maid-servant opened the door, and they came in and robbed him, and this being in the night-time, this was adjudged burglary and the persons hanged; for their intention being to rob, and getting the door open by a false pretence, this was *in fraudem legis*, and so they were guilty of burglary though they did not actually break the house, for this was in law an actual breaking, being obtained by fraud to have the door opened; as if men pretend a warrant to a constable, and bring him along with them, and under that pretence rob the house, if it be in the night this is burglary.[1]

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[1] This case, though never before printed, is cited in Vaillant's Dyer, 99 *note.* — Ed.

REX *v.* GRAY.

OLD BAILEY. 1722.

[*Reported* 1 *Strange*, 481.]

ONE of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape; and KING, C. J., ruled it to be burglary, and the defendant was convicted and transported.

REX *v.* LYONS.

CROWN CASE RESERVED. 1778.

[*Reported Leach* (4*th ed.*), 185.]

AT the Old Bailey in January Session, 1778, Lyon Lyons and Thomas Miller were tried before Mr. Serjeant Glynn, Recorder, for burglariously breaking and entering the dwelling-house of Edward Smith, with intention to commit a felony.

The jury found a general verdict *guilty*, subject to the opinion of the judges upon the following case: —

Mr. Smith had some time before purchased this house with an intention to reside in it, and had moved some of his effects to the value of about ten pounds, into the house; but at the time the offence was supposed to have been committed, it was under the care of a carpenter, for the purpose of being repaired; and Mr. Smith had not himself entered into possession of any part of it, nor did any part of his family, or any person whatever sleep therein. The prisoners broke and entered this house in the night-time, with an intention to steal; but whether it can in construction of law be considered the dwelling-house of Edward Smith they submitted, &c.

This case was made upon the objection of Mr. *Howarth*, the prisoner's Counsel; and a copy of it was delivered to each of the judges named in the margin.[2]

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[1] *Acc.* Farr's Case, Kel. 43; Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940; Johnston *v.* Com., 85 Pa. 54. — ED.

[2] Lord MANSFIELD, DE GREY, C. J., SKINNER, C. B., BLACKSTONE, ASHHURST, NARES, GOULD, WILLES, JJ., PERRYN, HOTHAM, EYRE, BB.

THE JUDGES in Easter Term, 1778, were of opinion, That a house so situated could not be considered as a dwelling-house, it being completely uninhabited; and therefore there could be no burglary.

The judgment against the prisoners was accordingly arrested.

JOHNSON'S CASE.

CROWN CASE RESERVED. 1786.

[*Reported* 2 *East P. C.* 488.]

THOUGH if a thief enter a dwelling-house in the night-time through the outer door being left open, or by an open window; yet if when within the house he turn the key of or unlatch a chamber-door with intent to commit felony this is burglary: and so it was adjudged on a special verdict at Newgate, 1672. The same was lately ruled in Johnson's Case by all the judges; where the prisoner entered at a back door of the house of William Hughes at Newington in Surrey, which had been left open by the family; and afterwards broke open an inner door, and stole goods out of the room; and then unbolted the street door on the inside and went out.

REX *v.* DAVIES.

CROWN CASE RESERVED. 1800.

[*Reported Leach* (4*th ed.*), 876.]

AT the Old Bailey in June Session, 1800, John Davies was indicted before Mr. Baron Chambre, present Mr. Justice Grose and the Recorder, for stealing a quantity of pans, kettles, candlesticks, &c., above the value of 40*s.*, the property of Thomas Pearce in his dwelling-house.

The larceny was clearly proved, but it appeared that Mr. Pearce was a brewer in considerable business living in Milbank Street, and owner of the "Star and Garter" public-house in Palace-yard, in which house the larceny was committed. The house was at this time shut up, and in the day-time totally uninhabited; but Mr. Pearce's man was put to sleep in it at night for the protection of the goods that were in the house, until some other publican should take possession of it. It had remained in this state about six weeks previous to the robbery, during which time it had been let to a publican who had not taken possession of it. There were at this time in the house sixteen or seventeen beds, and a variety of chairs, tables, and other articles of furniture, which

Mr. Pearce had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally or by means of any of his servants.

The counsel for the prisoner submitted to the court that this house could not be considered as the dwelling-house of Pearce, and that therefore the prisoner ought to be acquitted of the capital part of the offence, and cited the cases stated in the margin.[1] The case, however, was left with the jury, and they found the prisoner guilty of the whole charge, but the point was saved for the consideration of the judges.

THE JUDGES, in Trinity Term, 1800, were of opinion that as it clearly appeared by the evidence that Mr. Pearce had no intention whatever to reside in this house either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that not being such a dwelling-house wherein burglary might be committed, the capital part of the charge under 12 Ann. c. 7, was done away.

The prisoner accordingly received his Majesty's pardon on condition of transportation.

COMMONWEALTH *v.* STEWARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1789

[*Reported* 7 *Dane's Abr.* 136.]

STEWARD was indicted for burglary in the house of John Fisk. The court held that it is a burglarious breaking to open a door when latched and shut, or to push up a window when shut down, though not fastened; these being in their shut position. But if a window be a little pushed up, or a door a little opened, &c., so that one passing by may see the owner has not properly shut his house, it is not a burglarious breaking to enter, though a further pushing up of the window or opening of the door be necessary for the person to enter; but that it is not customary for men, nor necessary always, to have all the glass of their windows whole, or the joints of their doors, windows, &c., exact.[2]

Attorney-General, for the State.

Bradbury, for the defendant.

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[1] Harris's Case, Leach, 701; Thompson's Case, Leach, 771; Fuller's Case, Leach, 186 *n*.

[2] *Acc.* Rex *v.* March, 1 Moo. C. C. 178. See Rex *v.* Lewis, 2 C. & P. 628. — ED.

COMMONWEALTH *v.* STEPHENSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1829.

[*Reported* 8 *Pickering*, 354.]

INDICTMENT for burglary. The evidence as to breaking was, that in the evening of May 22 the witness fastened the outer door of the dwelling-house by turning a button down upon the latch, and that about daybreak in the morning he found the door open, and also that the network of the buttery window had been cut away and torn down. The netting was made of double twine, and was fastened by nailing it on each side, and at the top and bottom of the window, for the purpose of letting in the air and keeping out cats and other small animals. Within the network there was a glass window, which had not been shut. Putnam, J., instructed the jury that if the defendants broke, cut, or tore away the net so fastened, it was in law a breaking of the dwelling-house. The defendants, being found guilty, moved for a new trial because the foregoing instruction was wrong.

Bates and *G. Bliss, Junior*, for the defendants. Entering by an open window will not sustain an indictment for burglary: 2 Russ. 901; 1 Hawk. P. C. c. 38, §§ 4, 5; 4 Bl. Com. 226; Callon's Case, cited in 2 Russ. 903; and the circumstance that a netting was stretched across the window in the present case is immaterial, as this netting was put up only as a security against the entry of small animals. The window was the natural protection against an entry by man. To constitute a breaking, the thing broken must be a part of the house. 1 Hawk. P. C. c. 38, §§ 4, 5; Foster, 108; 1 Hale, 552; 2 Stark. Ev. 320. This netting was not even a fixture. Beck *v.* Rebow, 1 P. Wms. 94; Gale *v.* Ward, 14 Mass. 356; Whiting *v.* Brastow, 4 Pick. 310; Com. *v.* Trimmer, 1 Mass. 476.[1]

Davis (Solicitor-General) cited 3 Chit. Crim. Law, 1093; 1 Hale, 552; East P. C. 487; 4 Bl. Com. 226.

PARKER, C. J., delivered the opinion of the court. The question in this case is, whether there was a breaking or not. The lifting a latch and opening the door, though not bolted or locked; the shoving up a window, though not fastened; the getting down a chimney, and various other acts done to effect an entry, are held to be a breaking. The offence consists in violating the common security of a dwelling-house in the night-time, for the purpose of committing a felony. It makes no difference whether the door is barred and bolted, or the window secured, or not; it is enough that the house is secured in the ordinary way; so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter. Shutting the window blinds and leaving the windows open for air is a common mode of closing a house in the warm season; if the blinds are forced, it is a breaking.

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[1] Part of the argument is omitted.

The objection is, that the lattice-work of the dairy window was of twine only. Suppose it were of wire or thin slats of wood, would there be any difference? This network was nailed down on all sides; it was torn away by the defendants, and they entered the breach. This is quite sufficient to constitute a burglarious breaking and entry.

Motion for a new trial overruled.

MASON *v.* PEOPLE.

COURT OF APPEALS OF NEW YORK. 1863.

[*Reported* 26 *New York*, 200.]

ERROR to the Supreme Court. The plaintiff in error was indicted in the New York General Sessions. The first count charged him with feloniously and burglariously breaking and entering, in the daytime, the dwelling-house of Christopher Thomas, "with intent to commit some crime therein," but not specifying what crime. The second count charged a larceny, in the dwelling-house before-mentioned, of a gold ring, the property of Minna Thomas. The evidence was that Thomas and his wife Minna occupied three rooms in what is known as a tenement house, for which they paid rent monthly. Three other families occupied different apartments of the same house, one of these families having rooms on the same floor with Thomas. There was one common door of entrance into the house, which opened from the street into the first floor or story, through which all the tenants passed to their respective apartments. When the offence was committed the front door was open, the prisoner breaking only the door of Mrs. Thomas' room, which she had left locked. The prisoner's counsel asked the court to charge that breaking an inner door in the daytime with intent to steal is not a burglary. He maintained that the outer door of the house was the outer door of every tenant living within; that the criminal breaking of that door would have been a burglary of the dwelling-house of the tenant whose property the offender intended to steal; and that, as a consequence, the breaking of the inner door was not, because a double burglary could not be committed by breaking first the street door and then the inner. The court refused to charge as requested, and the prisoner took an exception. He was convicted of burglary in the third degree, and the judgment having been affirmed by the Supreme Court in the first district, he appealed to this court.

S. H. Stewart, for the plaintiff in error.

A. Oakey Hall, for the People.

Emott, J.[1] As to the objection taken at the trial that burglary could not be committed by breaking and entering apartments in what is known in cities as a tenement house, a building occupied separately by several families, each having distinct apartments opening into a common hall, and thus communicating with the street, it has, in my judgment, no foundation. Any and every settled habitation of a man and his family is his house or his mansion, in respect to its burglarious entry. It was so held before Lord Hale's time as to chambers in colleges and inns of court, and even as to a chamber hired by A. in the house of B., for lodging for a specified time. Hale Pl. Cor., I., p. 556. Serjeant Hawkins (Cr. Law, vol. i. p. 163) gives the same rule as to tenement or lodging houses, except that he seems to suppose that a difference might arise when the owner of the house himself lived in it. But such an exception would only lie where the other inmates were lodgers with the owner, and not proprietors of distinct tenements separately hired and occupied for a longer or shorter time, with access either separately or jointly to the street. Wherever a building is severed by lease into distinct habitations, each becomes the mansion or dwelling-house of the lessee thereof, and is entitled to all the privileges of an individual dwelling. The case of the People *v.* Bush, 3 Park. Cr. R. 556, was precisely like the one at bar, and it was there held by three judges of the Supreme Court, of whom the one pronouncing the opinion was a learned and experienced criminal lawyer, that a room or rooms in a tenement house, rented to separate families with a door and entry common to all, constituted each the dwelling-house of the particular occupant in the sense of the law. Such we understand to be the well-settled rule.

The judgment of the Supreme Court affirming that of the Court of Sessions was right, and must be affirmed in this court.

Judgment affirmed.

QUINN *v.* PEOPLE.

Court of Appeals of New York. 1878.

[*Reported* 71 *New York*, 561.]

Folger, J.[1] The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. 2 R. S. p. 668, § 10, subd. 1. The crime, as there defined, consists in breaking into, and entering in the night-time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering, and the criminal intent. The questions mooted in this court are, whether it is legally proper, in an indictment for burglary of a dwelling-house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling-house within the intent of the statute. As to the first question: The indictment averred the breaking and entering into the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm-name and style of Kohnsen & Lubkin. The authorities are numerous enough and clear, that the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, when the facts of the case warrant it. In Rex *v.* Athea, R. & M. C. C. R. 329, the indictment averred the stealing in the dwelling-house of Halling and others. It appeared that Halling, Pierce & Stone carried on business on the premises in which the offence was committed. Pierce lived in the house, which was the joint property of the firm. The other partners resided elsewhere. It was held, upon a case reserved, that the dwelling-house was properly laid as that of all the partners. See, also, Rex *v.* Stockton & Edwards, 2 Taunt. 339; 2 Leach, 1015; s. c. *sub nom.* Rex *v.* Stock *et al.*, Russ. & Ry., 185; Rex *v.* Hawkins, Foster's Cr. Law, 38; Rex *v.* Jenkins, Russ. & Ry. 244; Saxton's Case, 2 Harr. 533.

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[1] Part of the opinion is omitted.

The facts of the case in hand are meagrely presented upon the error-book, but we gather from it, and from the concessions made upon the points and on the oral argument, that Kohnsen and Lubkin, the persons named in the indictment, were copartners in trade; and, as such, held and occupied the buildings, into one room of which the burglarious entry was made; that the lower or first stories of the buildings were used for the purposes of their business, and opened into each other; that in the upper rooms one only of the partners and some other persons lived, and were present on the night of the burglary. This state of facts is in accord with those presented in the cases above cited. We are of opinion that the first question presented must be resolved against the plaintiff in error. The ownership of the buildings was properly laid by the indictment in Kohnsen & Lubkin. The ownership remained with them; the actual possession of the portions of the buildings used for business was in them, and the possession of part of the portion of the buildings used to live in was in them, by the actual possession and occupation of that part by Kohnsen. They had not given such an interest to other persons in the whole or in parts of the buildings as to constitute an ownership in such other persons. 2 East, P. C. C. 15, § 18, p. 502. The cases are somewhat in conflict upon this point, it is true, and are not easily reconciled or distinguished; see Rex *v.* Margetts, *et al.*, 2 Leach, 930; but it is plain that here the partners, as such, had the ultimate control and right of possession of the whole buildings, and the actual possession of the shop entered, and of the sleeping-room above it, thus bringing the case within several decisions.

As to the second question: In addition to the facts already stated, it is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only. but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence up stairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is, that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling-rooms. there was not a breaking into a dwelling-house, and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point. I will first say that the definition of the crime of burglary in the first degree. given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same." . . . 2 Russ. on Cr. p. 1, § * 785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling-houses or a part thereof, so as to be the subject of burglary. For, so far as the Revised Statutes as already cited are concerned, what was a dwelling-house or a part thereof at common law, must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. Case of Gibson, Mutton & Wiggs, Leach's Cr. Cases, 320 (case 165), recognized in The People *v.* Parker, 4 Johns. 423. In the case from Leach, there was a shop built close to a dwelling-house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the court-yard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling-house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They were all of the opinion that the shop was to be considered a part of the dwelling-house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling-house. The case in Johnson's Reports, *supra*, is also significant, from the facts relied upon there to distinguish it from the case in Leach, *supra*. Those facts were that the shop entered, in which no one slept, though on the same lot with the dwelling-house, was twenty feet from it, not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both so as to bring them within one inclosure, therefore, the case was within that of The King *v.* Garland, 1 Leach Cr. Cas. 130 (or 171), case 77. It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did deem all out-houses, when they were within the same inclosure as the dwelling-house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling-house as such. Gibson's case, *supra*, would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling-house. The books have many cases to the same end. Rex *v.* Gibbons & Kew Russ. & Ry. 442, the case of a shop. Robertson's case, 4 City Hall Rec. 63, also a shop with no internal communication with the dwelling-house. Rex *v.* Stock *et al.*, Russ. & Ry. 185, a counting-room of bankers. *Ex parte* Vincent, 26 Ala. 145, one room in a house used as a wareroom for goods. Rex *v.* Witt, Ry. & M. 248, an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise, when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity, or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings, Rex *v.* Jenkins, Russ. & Ry. 244; Rex *v.* Westwood, id. 495; where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error. State *v.* Langford, 1 Dev. 253; State *v.* Jenkins, 5 Jones, 430; State *v.* Bryant Ginns, 1 Nott & McCord, 583. Though, in the case last cited, it is conceded that if a store is entered, which is a part of a dwelling-house, by being under the same roof, the crime is committed; and it must be so, if it is the circumstance of midnight terror in breaking open a dwelling-house, which is a chief ingredient of the crime of burglary; and it is for that reason that barns and other out-houses, if in proximity to the mansion-house, are deemed *quasi* dwelling-houses, and entitled to the same protection. State *v.* Brooks, 4 Conn. 446–449. Coke (3 Inst. 64) is cited to show that only those buildings or places, which in their nature and recognized use are intended for the domestic comfort and convenience of the owner, may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth *converse*" — that is, be employed or engaged with; Richardson's Dic., *in voce* — "being a parcell of a mansion-house, or not parcell, is taken for a mansion-house." So Hale is cited (vol. 1, P. C. 558); and it is there said that, "to this day it is holden no burglary to break open *such a shop*." But what does he mean by that phrase? That appears from the authority which he cites (Hutton's Reps. 33); where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling-house. But Hale also (vol. 1, P. C., p. 557) cites as law the passage from The Institutes above quoted. Other citations from text-books are made by the plaintiff in error; they will be found to the same effect, and subject to the same distinction as those from Coke and Hale. And see Rex *v.* Gibbons *et al.*, *supra;* Rex *v.* Richard Carroll, 1 Leach Cr. Cas. 272, case 115. That there must be a dwelling-house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error, of Rex *v.* Harris, 2 Leach, 701; Rex *v.* Davies. *alias* Silk, id. 876, and the like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling-house, but held the crime committed, if the building entered was within the same fence or inclosure as the building slept in. And the dwelling-house in which burglary might be committed was held formerly to include out-houses, — such as warehouses, barns, stables, cow-houses, dairy-houses, — though not under the same roof or joining contiguous to the house, provided they were parcel thereof. 1 Russ. on Cr. * 799, and authorities cited. Any out-house within the curtilage, or same common fence with the dwelling-house itself, was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or home-stall. State *v.* Twitty, 1 Hayw. (N. C.) 102; State *v.* Wilson, id. 242; see also State *v.* Ginns, 1 Nott & McCord, 583, *supra*, where this is conceded to be the common law. See note *a* to Garland's case, *supra*.

It seems clear, that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling-house.

The judgment brought up for review should be affirmed.

It may ward off misapprehension if it is said, that if different stores in a large building, some parts of which are used for sleeping apartments, are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in

For illustration, let there be mentioned the Astor House in New York city. The rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed; if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession of it; nor is it a dwelling-house of the tenant, for he does not lodge there. 1 Hale P. C. 557, 558; Kel. 83, 84; 4 Black. Com. 225, 226; East P. C. c. 15, § 20, p. 507.

ALLEN, MILLER, and EARL, JJ., concur; RAPALLO and ANDREWS, JJ., dissent; CHURCH, C. J., not voting. *Judgment affirmed.*

WALKER v. STATE.

SUPREME COURT OF ALABAMA. 1879.

[*Reported* 63 *Ala.* 49.]

BRICKELL, C. J. The statute (Code of 1876, § 4343) provides, that "any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building, structure, or inclosure within the curtilage of a dwelling-house, though not forming a part thereof, or into any shop, store, warehouse or other building, structure, or inclosure in which any goods, merchandise or other valuable thing is kept for use, sale, or deposit, provided such structure, other than a shop, store, warehouse, or building, is specially constructed or made to keep such goods, merchandise, or other valuable thing, is guilty of burglary," etc.

The defendant was indicted for breaking into and entering "a corn-crib of Noadiah Woodruff and Robert R. Peeples, a building in which corn, a thing of value, was at the time kept for use, sale, or deposit, with intent to steal," etc. He was convicted: and the case is now presented on exceptions taken to instructions given, and the refusal of instructions requested, as to what facts will constitute a breaking into and entry, material constituents of the offence charged in the indictment. The facts on which the instructions were founded are: that in the crib was a quantity of shelled corn, piled on the floor; in April or May, 1878, the crib had been broken into, and corn taken therefrom. without the consent of the owners, who had the crib watched; and thereafter the defendant was caught under it, and on coming out, voluntarily confessed that about three weeks before he had taken a large auger, and going under the crib, had bored a hole through the floor, from which the corn, being shelled, ran into a sack he held under it; that he then got about three pecks of corn, and with a cob closed the hole. On these facts the City Court was of opinion, and so instructed the jury, that there was such a breaking and entry of the crib, as would constitute the offence, and refused instructions requested asserting the converse of the proposition.

The material changes the statute has wrought as to the offence of burglary, as known and defined at common law, are as to the time and place of its commission. An intent to steal or to commit a felony are the words of the statute, while an intent to commit a felony were the words of the common law. Under our statutes, a felony is defined as a public offence, punished by death, or by imprisonment in the penitentiary; while public offences otherwise punishable are misdemeanors. The larceny of other than personal property particularly enumerated, and under special circumstances, the property not exceeding the value of $25, is petit larceny, and a mere misdemeanor. The intent to steal, as an element of burglary, is therefore made the equivalent of an intent to commit a felony, though the value of the thing intended to be stolen may be less than $25, and its larceny a misdemeanor.

The statute employs the words, "breaks into and enters;" and these are borrowed from the common-law definition of burglary. They must be received with the signification, and understood in the sense given them at common law. "There must, in general," says Blackstone, "be an actual breaking, not a mere legal *clausum fregit* by leaping over invisible ideal boundaries, which may constitute a civil trespass, but a substantial and forcible irruption." The degree of force or violence which may be used is not of importance, — it may be very slight. The lifting the latch of a door; the picking of a lock, or opening with a key; the removal of a pane of glass, and indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the house, is a breaking — an actual breaking — within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statute. In Hughes' case, 1 Leach, C. C., case 178, the prisoner had bored a hole with a centre-bit through the panel of the house door, near to one of the bolts by which it was fastened, and some pieces of the broken panel were found withinside the threshold of the door, but it did not appear that any instrument except the point of the centre-bit, or that any part of the prisoner's body had been withinside the house, or that the aperture made was large enough to admit a man's hand. The court were of opinion that there was a sufficient breaking, but not such an entry as would constitute the offence.

The boring the hole through the floor of the crib was a sufficient breaking, but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal or the intent to commit a felony, is proof of one only of the facts making up the offence, and is as insufficient as proof of an entry through an open door without breaking. If the hand or any part of the body is intruded within the house the entry is complete. The entry may also be completed by the intrusion of a tool or instrument within the house, though no part of the body be introduced. Thus, "if A. breaks the house of B. in the night-time, with intent to steal goods, and breaks the window and puts in his hand, or puts in a hook or other engine to reach out goods, or puts a pistol in at the window, with an intent to kill, though his hand be not within the window, this is burglary." 1 Hale, 555. When no part of the body is introduced, — when the only entry is of a tool or instrument introduced by the force and agency of the party accused, the inquiry is whether the tool or instrument was employed solely for the purpose of breaking, and thereby effecting an entry, or whether it was employed not only to break and enter, but also to aid in the consummation of the criminal intent and its capacity to aid in such consummation. Until there is a breaking and entry the offence is not consummated. The offence rests largely in intention, and though there may be sufficient evidence of an attempt to commit it, which of itself is a crime, the attempt may be abandoned, — of it there may be repentance before the consummation of the offence intended. The breaking may be at one time and the entry at another. The breaking may be complete, and yet an entry never effected. From whatever cause an entry is not effected, burglary has not been committed. When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated and necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, the offence is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law.

Let the judgment be affirmed.

Judgment affirmed.

SECTION II.

Arson.

1 Hawk. P. C. ch. 18, sects. 1, 2. Arson is a felony at common law, in maliciously and voluntarily burning the house of another by night or by day.

Not only a mansion-house, and the principal parts thereof, but also any other house, and the outbuildings, as barns and stables, adjoining thereto, and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is arson, and it is said, that in an indictment they are well expressed by the word *domus*, without adding *mansionalis*.

But it seems that at this day the burning of the frame of a house,[1] or of a stack of corn, &c., is not accounted arson, because it cannot come under the word *domus*, which seems at present to be thought necessary in every indictment of arson, yet it is said that anciently the burning a stack of corn was accounted arson.

ANONYMOUS.

Assizes. 1495.

[*Reported Year Book*, 11 *H. VII.* 1.]

A man was indicted because he had feloniously at night burned a barn, and because it adjoined the house, it was held felony at common law, and the party was hanged.

HOLMES'S CASE.

King's Bench. 1634.

[*Reported Croke Car.* 376.]

William Holmes was indicted in London, For that he, in April, 7 Car. I., being possessed of an house in London, in Throgmorton street, in such a ward, for six years, remainder to John S. for three years, the reversion to the corporation of Haberdashers, in fee: he *vi et armis*, 3 April, 7 Car. I., the said house "felonicè, voluntariè, et malitiosè, igne combussit, eâ intentione, ad eandem domum mansionalem, nec non diversas alias domos mansionales diversorum ligeorum, domini regis, adtunc et idem situat. et existent. ad dictum domum mansionalem dicti Willielmi Holmes contiguè adjacent. adtunc et ibidem felonicè, voluntariè, et malitiosè totaliter comburendo et igne consumendo contra pacem."

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[1] See Mulligan *v.* State. 25 Tex. App. 199. — Ed.

Upon his being arraigned at Newgate, he was found guilty; but before judgment this indictment was removed by *certiorari* into this court. It was argued at the bar by *Grimston*, that it was not felony; and now this Term at the bench.

And, by RICHARDSON, Chief Justice, JONES, and BERKLEY, [JJ.], it was held, that it was not felony to burn a house whereof he is in possession by virtue of a lease for years; for they said, that burning of houses is not felony, unless that they are *œdes alienœ:* and therefore Britton, p. 16, Bracton, p. 146, and The Book Assize, 27, Assize, pl. 44, mention, that it is felony to burn the house of another; and 10 Edw. 4, pl. 14; 3 Hen. 7, pl. 10; 10 Hen. 7, pl. 1, and Poulter's Case, 11 Co. 29, which say, that burning of houses generally is felony, are to be intended *de œdibus alienis, et non propriis:* and although the indictment be "eâ intentione ad comburendum felonicè, voluntariè, et malitiosè," the houses of divers others "contiguè adjacentes," yet intent only without fact is not felony. Also BERKLEY and JONES, Justices, held, that it cannot be said to be *vi et armis* when it is in his own possession.

JONES, Justice, also said, that he could not be well indicted of felony, because none of their names are mentioned who were the owners of the houses adjoining. But to that objection BERKLEY and RICHARDSON, [JJ.], agreed not.

But *I* argued, that the burning in the indictment mentioned is felony, because it is *capitale crimen, felleo animo perpetratum*, which is the definition of felony in Co. Lit. 391, a. Also by the rule in Bracton, 146. "quod incendium nequiter, et ob inimicitias, factum capitali pœnâ puniatur; si verò sit incendium fortuitò vel per negligentiam, et non malâ conscientiâ, non sic punietur; sed versus eum criminaliter agatur." And it cannot be said to be by negligence in another's house; wherefore it is to be intended in his own house. Also this burning is found to be *malitiosè;* so it is *malâ conscientiâ et nequiter factum.* Also this burning of his house in a street of the city adjoining to the houses of others, is to the endangering of the city, and therefore ought to be construed to be felony; but so peradventure is not the burning of his house in the fields. And whereas it was said, that the intention cannot make a felony, it was answered, that the intention here is coupled with an act of burning, and with the intendment of an act which is felony; as 5 Hen. 7, pl. 18; 7 Hen. 7, pl. 42; 13 Edw. 4, pl. 9; where a man delivers goods to one, and afterwards he that delivered them privately steals them, to the intent to charge him, it is felony. And whereas it was objected, that being his own possession, it cannot be said *vi et armis;* I answered, that *vi et armis* is well enough, where there is a malfeasance, as it is in an action upon the

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case, 9 Co. 50, b. Also every indictment is *vi et armis et contra pacem*, where an act is done against the commonwealth: so it is where a servant runs away with goods committed to his trust above forty shillings, although properly it cannot be said to be *vi et armis*, because they were in his custody. And in this case the ill consequence which might have fallen out by this act makes the offence the greater; and The Year Books in 10 Edw. 4, pl. 14; 3 Hen. 7, pl. 10; 11 Hen. 7, pl. 1; and Stanford, 36; 11 Co. 29; 4 Co 20, a, put the case of burning of houses generally, and not of the burning of other men's houses: and it is an equal mischief in a commonwealth to burn his own in a city or vill as to burn the houses of others, for the danger which may ensue.

But THE OTHER THREE JUSTICES resolved *ut supra*, that it was not felony; wherefore he was discharged thereof.

But because it was an exorbitant offence, and found, they ordered, that he should be fined £500 to the king, and imprisoned during the king's pleasure, and should stand upon the pillory, with a paper upon his head signifying the offence, at Westminster and at Cheapside, upon the market-day, and in the place where he committed the offence, and should be bound with good sureties to his good behavior during life.[1]

ISAAC'S CASE.

SPRING ASSIZES. 1799.

[*Reported* 2 *East P. C* 1031.]

JOHN ISAAC was indicted for a misdemeanor in having unlawfully, wilfully, and maliciously set on fire and burnt a certain house of Thomas Isaac, being in the occupation of the said John Isaac: which house the indictment alleged was contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.; by means whereof the same were in great danger of being set on fire and burnt. There was a second count which differed only in charging that the house set on fire was the prisoner's own house.

The counsel for the prosecution opened that the charge to be proved against the defendant, though laid as a misdemeanor, was, that he wilfully set on fire his own house in order to defraud the Phœnix fire-insurance office; and that in fact his own and several other person's houses adjoining were burnt down. Upon which BULLER, J., said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony; the misdemeanor being merged; and he could not be convicted on this indictment; and therefore directed an acquittal.[2]

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[1] See s. c. reported W. Jones, 351. — ED.

[2] See Probert's Case, 2 East P. C. 1030. — ED.

COMMONWEALTH *v.* TUCKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[*Reported* 110 *Mass.*, 403.]

INDICTMENT alleging that the defendant set fire to the barn of William H. Codding, and by the kindling of said fire and the burning of said barn, the dwelling-house of Codding was "burned and consumed." At the trial in the Superior Court, before Brigham, C. J., the evidence tended to show that the barn was burned entirely; that the shingles on the roof of the dwelling-house took fire and were burned in two places; and that persons were on the roof keeping it wet with water; but as to how much the shingles were burned there was a conflict of testimony.

The defendant asked the judge to instruct the jury "that they must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and had been burned and consumed thereby; and that the substance and fibre of the wood of such portion so on fire was actually destroyed." But the judge refused so to instruct the jury, and instructed them "that they must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and had been burned thereby, so that the substance of the wood of such portion so on fire was actually burned." The jury returned a verdict of guilty, and the defendant alleged exceptions.

S. R. Townsend, for the defendant, cited Commonwealth *v.* Betton, 5 Cush. 427; Commonwealth *v.* Van Schaack, 16 Mass. 105.

C. R. Train, Attorney General, for the Commonwealth. The indictment is upon the Gen. Sts. c. 161, § 1, which provide that "whoever wilfully and maliciously burns the dwelling-house of another," or "wilfully and maliciously sets fire to any building, by the burning whereof such dwelling-house is burnt," shall be punished. The instructions were correct. Commonwealth *v.* Van Schaack, 16 Mass. 105; Commonwealth *v.* Betton, 5 Cush. 427; Regina *v.* Parker, 9 C. & P. 45; Regina *v.* Russell, C. & Marsh. 541; 2 East P. C. 1020; 1 Hale P. C. 568; Roscoe Crim. Ev. (8th ed.) 281.

WELLS, J. The instructions given to the jury were correct, and in accordance with the authorities; as well those cited for the defendant as those for the Commonwealth. They required the jury to find that some portion of the dwelling-house had been actually on fire and burned. To have required them to find something more, by use of the terms "consumed" and "destroyed," as prayed for, would have been to go beyond the provisions of the statutes, and to leave the jury with no precise definition of that which was necessary to constitute the offence.

Exceptions overruled.

CHAPTER XIII.

FORGERY.

REGINA *v.* CLOSS.

Court for Crown Cases Reserved. 1857.

[*Reported Dears. & B. C. C.* 460.]

The following case was reserved and stated at the Central Criminal Court.

The prisoner was tried for the forgery of a copy of a painting, on which he painted the signature "John Linnell."[1]

It was objected by the prisoner's counsel, in arrest of judgment, that these counts disclosed no indictable offence, and the judgment was respited until the next sessions, that the opinion of this Court might be taken whether or not the second and third counts, or either of them, sufficiently showed an offence indictable at common law. The prisoner remains in custody.

This case was argued, on the 21st November, 1857, before Cockburn, C. J., Erle, J., Williams, J., Crompton, J. and Channell, B.

Metcalfe appeared for the Crown, and *McIntyre* for the prisoner.

McIntyre, for the prisoner.

The second and third counts are bad in arrest of judgment. The second count charges in substance a cheat at common law, and that cheat is not properly laid. An indictment for a cheat at common law should so set out the facts as to make it appear on the record that the cheat charged would affect, not a private individual, but the public generally (2 Russ. on Crimes, 280). The obtaining money by means of a mere assertion, or by the use of a false private token, is not an indictable offence at common law (2 East P. C. 820). In this count the allegation is that a false token of a private character was used.

The third count is for forgery of the name of John Linnell on a picture. Forgery is defined to be the fraudulent making or alteration of a writing, to the prejudice of another's right (2 Russ. on Crimes, 318). In the case of a written instrument, the forgery of the signature is really the forgery of the whole instrument, and is always so laid in the indictment. Unless, therefore, an indictment would lie for the forgery of a picture, this count cannot be supported. The averments in this count amount to no more than this, in substance, — that the prisoner falsely pretended that the picture was Linnell's. To falsely pretend that a gun was made by Manton would be no offence at common law; and no case has gone the length of holding that to stamp the name of Manton on a gun would be forgery.

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[1] This short statement is substituted for the copy of the indictment. — Ed.

CROMPTON, J. — That would be forgery of a trade mark, and not of a name.

COCKBURN, C. J.— Stamping a name on a gun would not be a writing; it would be the imitation of a mark, not of a signature.

McIntyre. The name put by a painter in the corner of a picture is not his signature. It is only a mark to show that the picture was painted by him. Any arbitrary sign or figure might be used for the same purpose instead of the name; it is a part of the painting, and every faithful copy would contain it. The averments mean that the whole picture was made to represent the whole of the original; and the averment of the imitation of the signature is no more than an averment of the imitation of a tree or a house in the original. There is no allegation that the picture was passed off as the original, or the signature as the genuine signature; neither is there any averment that the name was painted for the purpose of inducing the belief that the picture was the original.

Metcalfe, for the Crown. It is not necessary to show that the cheat alleged in a count for cheating at common law is one which affects the public generally. If to a bare lie you add a false token, it is indictable, and it is a mistake to suppose that the public must be affected.

ERLE, J. — The prisoner did not get the money for the name but for the picture.

Metcalfe. He obtained it by the whole transaction. In Worrel's case, Trem. P. C. 106, deceitfully counterfeiting a general seal or mark of the trade on cloth of a certain description and quality, was held to be an indictable cheat. This case and Farmer's case, Trem. P. C. 109. show that the fraud need not be of a strictly public nature, and that any device calculated to defraud an ordinarily cautious person is indictable. In this case the picture was in fact a device calculated to deceive the public.

The third count for forgery is good. In Regina *v.* Sharman, Dears. C. C. 285, it was decided that it is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law, and that the effecting the fraud is immaterial. This decision overruled the decision in Regina *v.* Boult, 2 Car. & Kir. 604.

A false certificate in writing is the subject of an indictment at common law; Regina *v.* Toshack, 1 Den. C. C. 492.

I therefore contend that where, as here, the name of the artist is painted on the picture, it is in the nature of a certificate, and the fact that the signature is on canvas, instead of being on a separate piece of paper, does not render the offence less indictable.

WILLIAMS, J. — But it is consistent with all the allegations that the prisoner may have sold the picture without calling attention to the signature.

Metcalfe. The forging the name on a picture is in fact a forgery of the picture.

Cockburn, C. J.—If you go beyond writing, where are you to stop? Can sculpture be the subject of forgery?

McIntyre replied.

Cur. adv. vult.

The judgment of the Court was delivered, on 30th November, 1857, by

Cockburn, C. J.—The defendant was indicted on a charge, set out in three counts of the indictment, that he had sold to one Fitzpatrick a picture as and for an original picture painted by Mr. Linnell, when in point of fact it was only a copy of a picture which Mr. Linnell had painted; and that he passed it off by means of having the name "J. Linnell" painted in the corner of the picture, in imitation of the original one, on which the name was painted by the painter. Upon the first count, for obtaining money by false pretences, the defendant was acquitted; the second was for a cheat at common law; and the third was for a cheat at common law by means of a forgery. As to the third count we are all of the opinion that there was no forgery. A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his. As to the second count, we have carefully examined the authorities, and the result is that we think if a person, in the course of his trade openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, in the case put by way of example during the argument, if a man sold a gun with the mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment if the indictment were fairly framed so as to meet the case; and therefore, upon the second count of this indictment, the prisoner would have been liable to have been convicted if that count had been properly framed; but we think that count is faulty in this respect, that, although it sets out the false token, it does not sufficiently show that it was by means of such false token the defendant was enabled to pass off the picture and obtain the money. The conviction, therefore, cannot be sustained.

Crompton, J.—The modern authorities have somewhat qualified the older ones, but I do not wish to pledge myself to the view taken as to the nature of the false token, which would amount to a cheat at common law. I would be inclined to adopt the view taken by the rest of the Court, but do not pledge myself to it. I concur in the judgment that this conviction cannot be sustained upon the grounds stated by the Chief Justice.

Conviction quashed.

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REGINA *v.* RITSON.

Court for Crown Cases Reserved. 1869.

[*Reported L. R.* 1 *C. C.* 200.]

Case stated by Hayes, J.: —

The prisoners were indicted at the last Manchester assizes under 24 & 25 Vict. c. 98, § 20, for forging a deed with intent to defraud J. Gardner.

W. Ritson was the father of S. Ritson. He had been entitled to certain land which had been conveyed to him in fee, and he had borrowed of the prosecutor, J. Gardner, on the security of this land, more than 730*l.*, for which he had given on the 10th of January, 1868, an equitable mortgage by written agreement and deposit of title deeds.

On the 5th of May, 1868, W. Ritson executed a deed of assignment under the Bankruptcy Act, 1861, conveying all his real and personal estate to a trustee for the benefit of creditors; and on the 7th of May, 1868, by deed between the trustee and W. Ritson and the prosecutor, reciting, amongst other things, the deed of assignment and the mortgage, and that the money due on the mortgage was in excess of the value of the land, the trustee and W. Ritson conveyed the land and all the estate, claim, etc., of the trustees and W. Ritson therein, to the prosecutor, his heirs and assigns, for ever. After the execution of this conveyance the prosecutor entered into possession of the land. Subsequently S. Ritson claimed title to the land, and commenced an action of trespass against the prosecutor. The prosecutor then saw the attorney for S. Ritson, who produced the deed charged as a forged deed, and the prosecutor commenced this prosecution against W. and S. Ritson.

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This deed was dated the 12th of March, 1868, the date being before W. Ritson's deed of assignment and the conveyance to the prosecutor, and purported to be made between W. Ritson of the one part and S. Ritson of the other part. It recited the original conveyance in fee to W. Ritson, and that W. Ritson had agreed with S. Ritson for a lease to him of part of the land at a yearly rent, and then professed to demise to S. Ritson a large part of the frontage and most valuable part of the land conveyed to the prosecutor, as mentioned above, for the term of 999 years from the 25th of March then instant. The deed contained no notice of any title, legal or equitable, of the prosecutor, and contained the usual covenants between a lessor and lessee. It was executed by both W. and S. Ritson.

The case then stated evidence which shewed that the deed had in fact been executed after the assignment to W. Ritson's creditors and after the conveyance to the prosecutor, and that the deed had been fraudulently antedated by W. and S. Ritson for the purpose of overreaching the conveyance to the prosecutor.

The counsel for the prisoners contended that the deed could not be a forgery, as it was really executed by the parties between whom it purported to be made. The learned judge told the jury that if the alleged lease was executed after the conveyance to the prosecutor, and antedated with the purpose of defrauding him, it would be a forgery. The jury found both the prisoners guilty.

The question was whether the prisoners were properly convicted of forgery under the circumstances.

The case was argued before KELLY, C. B., MARTIN, B., BLACKBURN, LUSH, and BRETT, JJ.

Torr, for the prisoners. The deed in this case was not forged, because it was really made between and executed by W. and S. Ritson, the persons by whom it purported to be executed, and between whom it purported to have been made. The date of the deed was false, but a false statement in a deed will not render the deed a forgery. If this deed were held to be a forgery, then any instrument containing a false statement made fraudulently would be forged.

[BLACKBURN, J. This is not merely a deed containing a false statement, but it is a false deed.]

There is no modern case to shew that a deed like this is a forgery. To constitute a forgery, there must be either, first, a false name, or, secondly, an alteration of another's deed, or, thirdly, an alteration of one's own deed. There is no modern authority to include any other kind of forgery. Salway *v.* Wale, Moore, 655, appears an authority against the prisoners, but that was a decision upon 5 Eliz. c. 14, which is not worded in the same way as 24 & 25 Vict. c. 98, § 20. The definitions of the text-writers, which may seem to include a case like the present, are not in themselves authorities. The decisions on which the definitions purport to be based, and not the definitions themselves, are the authorities which must be looked at.

Addison, for the prosecution. The deed in this case is a forgery, because it is a false deed fraudulently made. Although there is no recent case where similar facts have been held to constitute a forgery, yet such a state of facts comes within the definitions of forgery given by the text-books. Russell, vol. ii, p. 709, 4th ed.; Hawkins, P. C. bk. i, cap. 20, p. 263, 8th ed.; 3 Inst. 169; Bacon's Abr., tit. Forgery, A.; Comyn's Dig., tit. Forgery, A. I. Salway *v.* Wale, Moore, 655, is also an authority for the conviction. The essence of forgery is the false making of an instrument. Rex *v.* Parkes, 2 Leach, at p. 785.

KELLY, C. B. During the argument I certainly entertained doubts on this question, because most, or indeed all, the authorities cited are comparatively ancient. They are all before the statute (24 & 25 Vict. c. 98, § 20), on which this indictment is framed, and before 11 Geo. 4 & 1 Wm. 4, c. 66, the statute which was in force when most of the modern text-books on criminal law were written. When, however, we look to all these authorities, and to the text-writers of the highest reputation, such as Comyns (Dig., tit. Forgery, A. I.), Bacon (Abr., tit. Forgery, A.), and Coke (3 Inst. 169), we find there is no conflict of authority. Sir M. Foster (Foster's Crown Cases, 116), Russell on Crimes (vol. ii, p. 709, 4th ed.), and other writers, also all agree. The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my Brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. I adopt this definition. It is impossible to distinguish this case in principle from those in which deeds made in a false name are held to be forgeries.

There is no definition of forgery in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors, and we think this case falls within their definitions. Under these circumstances the conviction must be affirmed.

MARTIN, B. I am of the same opinion. Mr. Torr was, no doubt, right in saying that this is not a familiar case. That, however, need not affect the principle to be applied in deciding it. All the authorities are to the same effect. What is laid down on the subject by Comyns (Dig., tit. Forgery, A. I.), Russell on Crimes (vol. ii, p. 709, 4th ed.), Sir M. Foster (Foster's Crown Cases, 116), and in Tomlin's Law Dictionary (Forgery), is good sense. All the authorities, both the ancient and modern, agree. There is no reason why the principle of these authorities should not apply to the present case, except that the facts here are somewhat unusual.

BLACKBURN, J. I am of the same opinion. By 24 & 25 Vict. c. 98, § 20, it is a felony to "forge" any deed with intent to defraud. The material word in this section is "forge." There is no definition of "forge" in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig., tit. Forgery, A. I.) is "forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another," — not making an instrument containing that which is false, which, I agree with Mr. Torr, would not be forgery, but making an instrument which purports to be that which it is not. Bacon's Abr., (tit. Forgery, A.), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, . . . but in the endeavoring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." The material words, as applicable to the facts of the present case, are, "to make a man's own act appear to have been done at a time when it was not done." When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law.

Ordinarily the date of a deed is not material, but it is here shown by extrinsic evidence that the date of the deed was material. Unless the deed had been executed before the 5th of May, it could not have conveyed any estate in the land in question. The date was of the essence of the deed, and as a false date was inserted with a fraudulent intent, the deed was a false deed, within the definition in Bacon's Abridgment. This is a sufficient authority.

If, however, there were no authority, I think that the principle I have mentioned is right and expedient. Besides this, however, Coke (3 Inst. 169), speaking of forgery before the statute of Elizabeth (5 Eliz. c. 14), states that the principle of forgery does apply to a case like this, and that to make a deed purporting to bear a false date may be a forgery. To the same effect is Sir M. Foster in Lewis's Case, Foster's Crown Cases, 116, where all the judges in consultation assumed that antedating a deed might be forgery.

All the text-books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that this gives it all the greater weight.

LUSH, J. I also think that the conviction should be affirmed. If the parties to this deed had inserted the true date in the first instance and had subsequently altered it, there is no question that it would have been a forgery. The offence would then have fallen within the letter of 24 & 25 Vict. c. 98, § 20, which says, "Whoever with intent to defraud shall forge or alter . . . any deed," etc., shall be guilty of felony. It would be absurd to hold that an alteration might constitute a forgery, but that an original false making would not. We could not yield to such a distinction unless we were obliged. I am satisfied that "forge" in § 20 of 24 & 25 Vict. c. 98, should be understood in the sense in which that word is used in the authorities, new and old, on the subject. To make a deed appear to be that which it is not, if done with a fraudulent intent to deceive, is a forgery, whether the falsehood consist in the name or in any other matter.

BRETT, J., concurred. *Conviction affirmed.*

Wis. Statute 343.56 — .57

COMMONWEALTH *v.* RAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1855.

[*Reported* 3 *Gray*, 441.]

FORGERY. The indictment alleged that the defendant, on the 13th of July, 1854, at Boston, "did falsely make, forge, and counterfeit a certain writing in the form and similitude of a railroad ticket or pass, of the tenor following:

New York Central Railroad.
Albany to Buffalo.
Good this day only, unless indorsed by the conductor.
D. L. Fremyre.

Said counterfeit writing purporting to be a ticket or pass issued by the New York Central Railroad Company, whereby said corporation promise and assure to the owner and holder thereof a passage in their cars over their railroad, extending from Albany to Buffalo in the State of New York; said ticket being signed by D. L. Fremyre, on their behalf, he being their ticket clerk, or ticket agent;[1] . . . and that the said Miner L. Ray did then and there falsely make, forge, and counterfeit one of said tickets, with intent to defraud, against the peace of the Commonwealth."

At the trial in the Municipal Court the jury returned a verdict of guilty, and the defendant alleged exceptions.

DEWEY, J. The instrument here set forth as the subject of the alleged forgery is not one included in the enumeration in the Rev. Sts. c. 127, § 1. It is not, therefore, a statute offence. But many writings, not enumerated in the statutes, are yet the subjects of forgery at common law. The definition of forgery at common law is quite sufficient to embrace the present case. Take that in 4 Bl. Com. 247, "the fraudulent making or alteration of a writing to the prejudice of another man's right," or that of 2 East P. C. 861 (which is supported by Bac. Ab. Forgery, B, and followed in 2 Russell on Crimes, 358), that "the counterfeiting of any writing, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law;" or that of Mr. Justice Buller, "the making a false instrument with intent to deceive." Rex *v.* Coogan, 2 East P. C. 949. In 3 Greenl. Ev. § 103, it is said that forgery "may be committed of any writing which, if genuine, would operate as the foundation of another man's liability." See also Regina *v.* Boult, 2 Car. & K. 604.

It is said that this instrument does not import a contract or promise of any kind. We think otherwise, and that, although it is wanting in details of language fully stating the nature and extent of such contract, it has written language sufficiently indicative of a promise or obligation to render it an instrument of value, by the false and fraudulent making of which the rights of others would be prejudiced. This false instrument would, if genuine, have created a liability on the part of the New York Central Railroad Company to carry the holder thereof from Albany to Buffalo, and would, therefore, have been a contract of value in the hands of a third person.

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[1] Part of the statement of facts, the arguments, and part of the opinion are omitted. — ED.

It is then objected that the crime of forgery cannot be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by those to be bound. The question is whether the writing, the counterfeiting of which is forgery, may not be wholly made by means of printing or engraving, or must be written by the pen by the party who executes the contract. In the opinion of the court, such an instrument may be the subject of forgery when the entire contract, including the signature of the party, has been printed or engraved. The cases of forgery, generally, are cases of forged handwriting. The course of business, and the necessities of greater facilities for despatch, have introduced to some extent the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound.

The effect to be given to the words "writing" and "written" was much considered by this court in the case of Henshaw *v.* Foster, 9 Pick. 312. It arose in another form, and was not a question of forgery. But in the learned opinion of the late Chief Justice Parker, this question, as to what was embraced in these terms, seems to be fully settled, and it was there held that the words "writing" or "written" included the case of instruments printed or engraved, as well as those traced by the pen.

It has never been considered any objection to contracts required by the statute of frauds to be in writing that they were printed. It is true that in those cases, usually, the signature at the bottom is in manuscript, and the printed articles of contract leave the name to be thus filled up. In such cases, the signature by the pen is necessary to the execution of the contract. And this is the more expedient mode, as it furnishes the greater facility for ascertaining its genuineness. But if an individual or a corporation do in fact elect to put into circulation contracts or bonds in which the names of the contracting parties are printed or lithographed as a substitute for being written with the pen, and so intended, the signatures are to all intents and purposes the same as if written. It may be more difficult to establish the fact of their signature; but if shown, the effect is the same. Such being the effect of such form of executing like contracts, it would seem to follow that any counterfeit of it, in the similitude of it, would be making a false writing, purporting to be that of another, with the intent to defraud.[1] . . .

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[1] The learned judge held that the indictment was defective.— Ed.

COMMONWEALTH *v.* BALDWIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1858.

[*Reported* 11 *Gray*, 197.]

THOMAS, J. This is an indictment for the forgery of a promissory note. The indictment alleges that the defendant at Worcester in this county "feloniously did falsely make, forge, and counterfeit a certain false, forged, and counterfeit promissory note, which false, forged, and counterfeit promissory note is of the following tenor, that is to say:

'$457.88. Worcester, Aug. 21, 1856. Four months after date we promise to pay to the order of Russell Phelps four hundred fifty seven dollars $\frac{88}{100}$, payable at Exchange Bank, Boston, value received.

Schouler, Baldwin & Co.'

with intent thereby then and there to injure and defraud said Russell Phelps."

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House in Worcester, on the 21st of August, 1856, for a note of equal amount, which he held, signed by the defendant in his individual name, and which was overdue; and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co., the defendant said, "Henry W. Baldwin, and William Schouler of Columbus." He further said that no person was represented by the words "& Co." It appeared in evidence that the note signed Schouler, Baldwin & Co. was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant; or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult perhaps by a single definition of the crime of forgery to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of the prisoner, if it purports to be, and is desired to be received as the instrument of a third person having the same name.

As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in the Third Institute, 169, where A. made a feoffment to B. of certain land, and afterwards made a feoffment to C. of the same land with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name; making one's own act to appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin — the entry of the feoffor upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed — it is not easy to see how the date could be material.

The case of Mead *v.* Young, 4 T. R. 28, is cited as another exception to the rule. A bill of exchange payable to A. came into the hands of a person not the payee but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorsement was a forgery, and that no title to the note could be derived through a forgery. In this case of Mead *v.* Young, the party assumed to use the name and power of the payee. The indorsement purported to be used was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretence, a pretence that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk. c. 70, § 5.

If the defendant had written upon the note, "William Schouler by his agent Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co. Or if the partnership had in fact before existed but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of Regina *v.* White, 1 Denison, 208, the prisoner indorsed a bill of exchange, "per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery.

The *nisi prius* case of Regina *v.* Rogers, 8 Car. & P. 629, has some resemblance to the case before us. The indictment was for uttering a forged acceptance of a bill of exchange. It was sold and delivered by the defendant as the acceptance of Nicholson & Co. Some evidence was offered that it was accepted by one T. Nicholson in the name of a fictitious firm. The instructions to the jury were perhaps broad enough to include the case at bar, but the jury having found that the acceptance was not written by T. Nicholson, the case went no further. The instructions at *nisi prius* have no force as precedent, and in principle are plainly beyond the line of the settled cases.

The result is that the exceptions must be sustained and a new trial ordered in the common pleas. It will be observed however that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause. *Exceptions sustained.*

Not guilty

COLVIN *v.* STATE.

SUPREME COURT OF INDIANA. 1858.

[*Reported* 11 *Ind.* 361.]

[illegible]

PERKINS, J. Indictment for forgery. The offence charged consisted in the uttering, as true, a false and forged deed to a piece of land.

The facts may be shortly stated. John Randolph Brewster and Archibald R. Colvin were boarding, with their wives, at the house of Jacob Lesman, Fort Wayne, Indiana. They were destitute of money to pay their board, and their credit was about expiring. For the purpose of "making a raise," says the witness, they agreed to execute deeds for an exchange of land. They obtained a map, selected certain sections of land in Iowa and Texas, and agreed that Colvin should make a deed to Brewster for those in Texas, and Brewster to Colvin for those in Iowa. They accordingly went before a public officer, and got him to draw up and take acknowledgment of the deeds, talking at the time of the execution about the amount to be paid in cash by one to the other as the difference in the value of the lands, etc. Brewster executed his deed to Colvin in the name of James Brewster, a name he had assumed, for a short time, at Fort Wayne; but Colvin knew that his true name was John Randolph Brewster.

This deed, so executed to him by Brewster, Colvin took to Lesman, uttered it as a genuine deed, and placed it with him on deposit as an equitable mortgage of the land, in security for his board-bill.

The question is whether the act constituted the crime of forgery, under the following statute:

"Every person who shall falsely make, or assist to make, deface, destroy, alter, forge, or counterfeit," etc., "any record, deed, will, codicil, bond," etc.; "or any person who shall utter, or publish as true, any such instrument, knowing the same," etc., "with intent to defraud," etc., "shall be deemed guilty of forgery." 2 R. S. p. 412, § 30.

The deed was deposited for boarding already had, not to secure the price of future boarding; nor did the depositor board, or, at the time of the deposit, intend to board longer with Lesman, as the latter well knew.

The indictment contains but a single count, charges the uttering of the deed to Lesman, and specially avers the intent, in so doing, to have been to defraud him.

We think the case is not made out. No fraud appears to have been perpetrated upon Lesman. The debt already existing was not cancelled, but remained due, and the right to enforce payment of it left unimpaired. No new credit from Lesman was obtained upon the deed. He was in no worse situation after taking the deed than before.

Had Colvin been indicted for the forgery, with intent generally to defraud, such an indictment might, probably, have been sustained against him. See Wilkinson *v.* The State, 10 Ind. R. 372.

COMMONWEALTH *v.* HENRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[*Reported* 118 *Mass.* 460.]

DEVENS, J.[1] The last sentence of the instruction given by the judge, in response to the request of the defendant, "that if the defendant signed the name of J. C. Hill to said note without the authority of said Hill, and passed it as the note of J. C. Hill, expecting to be able to meet it when due, it would be a forgery," would undoubtedly, if it stood alone, be a defective statement of the law. But it is not to be separated from the sentence which precedes it, which distinctly states that there must be an intent to defraud, and, as thus connected, the obvious meaning of the instruction, and so it must have been understood by the jury, was that if the defendant signed the note under the circumstances supposed, intending thereby to defraud, this would be a forgery, even if he expected to be able to meet the note when due. The subject to which the request of the defendant was apparently intended to call the attention of the presiding judge, was the effect of his possession of the means and of his intention to take up the note when due, and in relation to this the statement of the law was correct. The intention of one who utters a forged note to take it up at maturity, and the possession of means which will enable him to do so, do not rebut the inference of intent to defraud, which is necessarily drawn from knowingly uttering it for value to one who believes it to be genuine, nor deprive the transaction of its criminal character. Commonwealth *v.* Tenney, 97 Mass. 50.

Exceptions overruled.

LASCELLES *v.* STATE.

SUPREME COURT OF GEORGIA. 1892.

[*Reported* 90 *Ga.* 347.]

THE indictment charged that Sidney Lascelles did falsely and fraudulently draw, make and forge a certain bill of exchange (setting it out) in the fictitious name of Walter S. Beresford, when his real and true name was Sidney Lascelles, with intent then and there to defraud Hamilton & Company, a mercantile house, etc. The bill of exchange purported to be a check for two hundred pounds on a London bank in favor of Hamilton & Co., signed "Walter S. Beresford."[2]

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[1] Only so much of the opinion as discusses the intent to defraud is given. — ED

[2] Only so much of the case as discusses the question of the signing by defendant of a name previously assumed by him is given. — ED.

Lumpkin, J. . . . Several grounds of the motion for a new trial are based upon the failure and refusal of the court to charge, in effect, that if the name signed by the accused, although not his own, was one which he had been accustomed to employ and under which he had done business, the jury could not convict him. It was insisted that, in order to constitute forgery, the name must have been assumed for the sole purpose of defrauding the persons alleged to have been defrauded. We think it immaterial for what purpose the name was originally assumed and used, if it is shown that in the instance in question it was used to defraud. It was a fictitious name, within the meaning of the statute (Code, § 4453), if the accused gave it a fictitious character which was calculated and intended to deceive by imparting an apparent value to the writing which might not otherwise attach to it in the minds of the persons with whom the accused was dealing. Where one has been accustomed to use a certain assumed name, it is not to be implied merely from his signing such name to a bill of exchange or other writing that the purpose is to defraud; it is not forgery unless there is something else besides the mere signing to show that the fictitious character of the name is in that instance an instrument of fraud. In the case of Dunn, 1 Leach C. C. 57, and Reg. *v.* Martin, 49 L. R., C. C., 244, cited for the plaintiff in error, there was no such showing made. In the present case, however, the accused, at the time of signing the writing, gave a fictitious character to the name, upon the faith of which he induced the parties with whom he was dealing to give value for the writing. According to his representations to them, it was the name of the son of Lord Beresford, an English nobleman of great wealth, who was about to deposit in bank $25,000 in the name of this son. When Mr. Hamilton hesitated about paying the money, the accused said: "Our name can command any amount of money in England." He not only used an assumed name, but, in connection with the signing of the writing in question, gave a fictitious character to the name, and impersonated that character in order to obtain money upon the writing, which he might not have gotten if he had simply represented himself to be Walter S. Beresford, or had stopped with the representations he had made as to his own wealth, without making these additional representations as to his relationship and standing. The parties with whom he was dealing paid over their money to the supposed son of Lord Beresford, upon the faith of a writing executed by the accused in that character, when, as it afterwards turned out, the name used was not his own name, and Lord Beresford had no son of the name used. There being no such son, it was not a case of personating another, as contemplated by section 4596 of the code. It was the personating of a fictitious person, and this is of the essence of the offence described in the section upon which the first count of this indictment was based. Code, § 4453.

CHAPTER XIV.

CRIMINAL CONSPIRACY.

SECTION I.

Under Ancient Statutes.

33 Edw. I. Stat. 2; [Ordinance of Conspirators.] Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth; and this extendeth as well to the takers, as to the givers. And stewards and bailiffs of great lords, which by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the King and his Council in his Parliament the thirty-third year of his reign.

THE POULTERER'S CASE.

Star Chamber. 1611.

[*Reported* 9 *Coke* 55 *b.*]

Mich. 8 *Jac. Regis*, the case between Stone, plaintiff, and Ralph Waters, Henry Bate, J. Woodbridge, and many other poulterers of London, defendants, for a combination, confederacy, and agreement betwixt them falsly and maliciously to charge the plaintiff (who had married the widow of a poulterer in Gracechurch Street) with the robbery of the said Ralph Waters, supposed to be committed in the county of Essex, and to procure him to be indicted, arraigned, adjudged, and hanged, and in execution of this false conspiracy, they procured divers warrants of justices of peace, by force whereof Stone was apprehended, examined, and bound to appear at the assizes in Essex; at which assizes the defendants did appear and preferred a bill of indictment of robbery against the said plaintiff; and the justices of assize hearing the evidence to the grand jury openly in court, they perceived great malice in the defendants in the prosecution of the cause; and upon the whole matter it appeared, that the plaintiff the whole day that Waters was robbed, was in London, so that it was impossible that he committed the robbery, and thereupon the grand inquest found *ignoramus*. And it was moved and strongly urged by the defendants' counsel, that admitting this combination, confederacy, and agreement between them to indict the plaintiff to be false, and malicious, that yet no action lies for it in this court or elsewhere, for divers reasons. 1. Because no writ of conspiracy for the party grieved, or indictment or other suit for the King lies, but where the party grieved is indicted, and *legitimo modo acquietatus*, as the books are F. N. B. 114 b; 6 E. 3, 41 a; 24 E. 3, 34 b; 43 E. 3, Conspiracy 11; 27 Ass. p. 59; 19 H. 6, 28; 21 H. 6, 26; 9 E. 4, 12, &c. 2. Every one who knows himself guilty may, to cover their offences, and to terrify or discourage those who would prosecute the cause against them, surmise a confederacy, combination, or agreement betwixt them, and by such means notorious offenders will escape unpunished, or at the least, justice will be in danger of being perverted, and great offences smothered, and therefore, they said, that there was no precedent or warrant in law to maintain such a bill as this is. But upon good consideration, it was resolved that the bill was maintainable; and in this case divers points were resolved.[1]

3. It is to be observed that there was means by the common law before indictment to protect the innocent against false accusations, and to deliver him out of prison. . . . And it is true that a writ of conspiracy lies not, unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books; and therefore in 27 Ass. p. 44, in the articles of the charge of inquiry by the inquest in the King's Bench, there is a *nota*, that two were indicted of confederacy, each of them to maintain the other, whether their matter be true, or false, and notwithstanding that nothing was supposed to be put in execution, the parties were forced to answer to it, because the thing is forbidden by the law, which are the very words of the book; which proves that such false confederacy is forbidden by the law, although it was not put in use or executed. So there in the next article in the same book, inquiry shall be of conspirators and confederates, who agree amongst themselves, &c. falsly to indict, or acquit, &c. the manner of agreement betwixt whom, which proves also, that confederacy to indict or acquit, although nothing is executed, is punishable by law: and there is another article concerning conspiracy betwixt merchants,

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[1] The first two points, not relating to the Law of Conspiracy, are omitted.

and in these cases the conspiracy or confederacy is punishable, although the conspiracy or confederacy be not executed; and it is held in 19 R. 2, Brief 926, a man shall have a writ of conspiracy, although they do nothing but conspire together, and he snall recover damages, and they may be also indicted thereof. Also the usual commission of oyer and terminer gives power to the commissioners to inquire, &c. *de omnibus coadunationibus*, *confœderationibus*, *et falsis alligantiis;* and *coadunatio* is a uniting of themselves together, *confœderatio* is a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act: in these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance, to the end to prevent the unlawful act, *quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud: et affectus punitur licet non sequatur effectus;* and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. Hil. 37 H. 8, in the Star Chamber a priest was stigmatized with F. and A. in his forehead, and set upon the pillory in Cheapside, with a written paper, *for false accusation.* M. 3 & 4 Ph. & Ma., one also for the like cause *fuit stigmaticus* with F. & A. in the cheek, with such superscription as is aforesaid. "*Vide Proverb'* 1. *Si te lactarerint peccatores et dixerint, veni nobiscum ut insidiemur sanguini, abscondamus tendiculas contra insontem frustra, &c. omnem pretiosam substantiam reperiemus et implebimus domus nostras spoliis, &c. Fili mi, ne ambules cum eis, &c. pedes enim eorum ad malum currunt, et festinant ut effundant sanguinem.*" And afterward upon the hearing of the case, and upon pregnant proofs, the defendants were sentenced for the said false confederacy by fine and imprisonment. *Nota*, reader, these confederacies, punishable by law, before they are executed, ought to have four incidents: 1. It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or promises one to the other; 2. It ought to be malicious, as for unjust revenge, &c. 3. It ought to be false against an innocent: 4. It ought to be out of court voluntarily.

SECTION II.

Conspiracy in General.

REX *v.* EDWARDS.

King's Bench. 1724.

[*Reported* 8 *Modern*, 320.]

The defendants were indicted, for that they, *per conspirationem inter eos habitam,* gave the husband money to marry a poor helpless woman, who was an inhabitant in the parish of B. and incapable of marriage, on purpose to gain a settlement for her in the parish of A. where the man was settled.

It was moved to quash this indictment, because it is no crime to marry a woman and give her a portion; and the justices are not proper judges what woman is capable of a husband, neither have they any jurisdiction in conspiracies.

It was insisted on the other side, that there is a crime set forth in this indictment, which is a conspiracy to charge a parish, &c. and a conspiracy to do a lawful act, if it be for a bad end, is a good foundation for an indictment. An indictment for a conspiracy to charge a man to be the father of a bastard-child, was held good, Temberley *v.* Child, 1. Sid. 68. s. c. 1 Lev. 62; Rex *v.* Armstrong, 1 Vent. 304, though fornication is a spiritual offence; because the Court of King's Bench has cognizance of every unlawful act by which damages may ensue. So an information for a conspiracy to impoverish the farmers of the excise, was held good.

To which it was answered, that those were conspiracies to do unlawful acts; but it was a good act to provide a husband for this woman.

The Court. The quashing indictments is a discretionary power of the court, but in this case the defendant has not showed anything to induce the court to quash the indictment; and if the matter be doubtful, the defendant must plead or demur; but indictments for conspiracies are never quashed.— A bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act be done in consequence thereof, Reg. *v.* Best, 2 Ld. Ray. 1167; s. c. 6 Mod. 185; but if the fault in the indictment be plain and apparent, it is quashed for that reason, and the party shall not be put to the trouble to plead or demur. Suppose there is a conspiracy to let lands of ten pounds a year value to a poor man, in order to get him a settlement, or to make a certificate man a parish-officer, or a conspiracy to send a woman big of a bastard-child into another parish to be delivered there, and so to charge that parish with the child; certainly these are crimes indictable. But in this indictment it is not set forth, that the woman was likely to be chargeable to the parish. As to the objection, that the sessions have no jurisdiction in conspiracy, the contrary is true; they have no jurisdiction in perjury at common law, but by the statute they have; and they have no jurisdiction to indict for forgery, but certainly they have jurisdiction *de conspirationibus*, Rex v. Rispal, 3 Burr. 1320; and such a person as this defendant is was punished by indictment at common law.[1]

But in the Trinity Term following judgment was given for the defendant, because it was not averred in the indictment, that the woman was last legally settled in the parish of B., but only that she was an inhabitant there.

REX v. TURNER.

King's Bench. 1811.

[*Reported* 13 *East*, 228.]

This was an indictment for a conspiracy, which stated that the defendants unlawfully and wickedly devising and intending to injure, oppress, and aggrieve T. Goodlake, of Letcombe Regis in the county of Berks, Esquire, on the 24th of November, 50th Geo. 3, with force and arms, at East Challow in the county aforesaid, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other persons unknown, to go into a certain preserve for hares at Letcombe Regis aforesaid, in the county aforesaid, belonging to the said T. G., without the leave and against the will and consent of the said T. G., to snare, take, kill, destroy, and carry away the hares in the said preserve then being, and to procure divers bludgeons and other offensive weapons, and to go to the said preserve armed therewith for the purpose of opposing any persons who should endeavor to apprehend or obstruct or prevent them in and from carrying into execution their unlawful and wicked purposes aforesaid; and that the said defendants, in pursuance of and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid before had, afterwards, to wit, on the said day, &c., about the hour of 12 in the night of the same day, with force and arms, at East Challow aforesaid, in the county aforesaid, unlawfully and wickedly did procure divers large bludgeons, and other offensive weapons, and did go to the said preserve of the said T. G. armed therewith, for the purpose of opposing any persons who should endeavor to apprehend, obstruct, or prevent them in and from carrying into execution their unlawful and wicked purposes aforesaid. And the said defendants, being so armed as aforesaid, in further execution of their unlawful and wicked purposes aforesaid, then and there did set divers, to wit, 100 snares, for the purpose and with the intent to take, kill, destroy, and carry away the hares in the said preserve then being; in contempt of the king and his laws, to the evil example of others, to the great damage of the said T. G., and against the peace, etc.

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[1] It is said, s. c. 1 Sess. Cases, 336, that the court left the defendants to demur or plead to it, as they should think fit; and s. c. 1 Stra. 707, that on a demurrer to this indictment, judgment was given for the defendant, because it is not an offence indictable.

After a verdict of guilty, it was moved in the last term, by *Jervis*, to arrest the judgment for the insufficiency of the charge, which was only that of an agreement to commit a mere trespass upon property, and to set snares for hares, and was not an indictable offence, but at most only an injury of a private nature, prohibited *sub modo*, under a penalty. And 2 Hawk. P. C. c. 25, s. 4, was referred to. Another objection was taken, that the place where the offence was committed was not alleged with sufficient certainty and precision.

Gleed now opposed the rule, and endeavored to sustain the indictment upon the authority of 2 Hawk. P. C. c. 72, s. 2, where it is said that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where several confederate to maintain one another in any matter whether it be true or false. The cases also show that it is equally an offence to combine to do a lawful act by unlawful means, or to an unlawful end, as to do an act in itself unlawful; as in the instance of workmen conspiring together to raise their wages, The King *v.* The Journeymen Tailors of Cambridge, 8 Mod. 11, or parish officers conspiring to marry a helpless pauper into another parish, to settle her there and rid themselves of her maintenance, The King *v.* Edwards and Others, 8 Mod. 320. And in all cases of unlawful conspiracy, the mere unlawful agreement to do the act, though it be not afterwards executed, constitutes the offence; according to Rex *v.* Armstrong and Others, 1 Ventr. 304, and Rex *v.* Rispal, 3 Burr. 1320, and 1 W. Black. 368. In this latter case the indictment for conspiring to charge a man with a false fact, and exacting money from him under pretence of stifling the charge, was sustained; though the fact imputed, which was merely that of taking hair out of a bag belonging to the defendant Rispal, did not import in itself to be any offence. [LORD ELLENBOROUGH, C. J. All the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity; insomuch that in Tailor and Towlin's case in Godb. 444, it was held necessary in conspiracy to allege the matter to be *false et malitiose*. By the old law indeed the offence was considered to consist in imposing by combination a false crime upon a person. But are you prepared to show that two unqualified persons going out together by agreement to sport is a public offence?] Modern cases have carried the offence further than some of the old authorities, such as The King *v.* Eccles and Others, where the defendants were convicted upon a charge of conspiring together *by indirect means* (not stating what those means were) to prevent a person from carrying on his trade. And in The King *v.* Spragge and Others, 2

Burr. 993, which charged the defendants with a conspiracy to indict and prosecute W. G. for a crime liable by law to be capitally punished, and that in pursuance of such conspiracy they did afterwards indict him; one of the objections was, that the charge was only of a conspiracy to indict, not of a conspiracy to indict *falsely;* but it was overruled.

Lord Ellenborough, C. J. That was a conspiracy to indict another of a capital crime; which no doubt is an offence. And the case of The King *v.* Eccles and Others was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. But I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther: I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.

Per Curiam. *Rule absolute.*[1]

REX *v.* PYWELL.

Westminster Sittings. 1816.

[*Reported* 1 *Starkie,* 402.]

This was an indictment against the defendants for a conspiracy to cheat and defraud General Maclean, by selling him an unsound horse.

It appeared that the defendant Pywell had advertised the sale of horses, undertaking to warrant their soundness. Upon an application by General Maclean at Pywell's stables, Budgery, another of the defendants, stated to him that he had lived with the owner of a horse which was shown to him, and that he knew the horse to be perfectly sound, and as the agent of Pywell, he warranted him to be sound. General Maclean purchased the horse, and took the following receipt:

"Received of —— Maclean, Esq., the sum of fifty guineas, for a gelding warranted sound, to be returned if not approved of within a week."

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[1] "After the most careful and elaborate consideration of the cases, I am satisfied that Rex *v.* Turner is not law." Lord Campbell, C. J., in Reg. *v.* Rowlands, 5 Cox 436, 490. "The King *v.* Turner, 13 East, 231, to say the least of it, is an odd case. Confederates armed with clubs to beat down opposition, entered a man's preserve in the night to take and carry away his hares; and Lord Ellenborough called this 'an agreement to go and sport on another's ground,' in other words, 'to commit a civil trespass'! It would be a curious thing to know what he would have called an agreement to steal a man's pigs or to rob his henroost. In its mildest aspect, the entry into the preserve with bludgeons was a riot, which, it appears by a note in the second volume of Mr. Chitty's Criminal Law, page 506, may be a subject of conspiracy." Gibson, C. J., in Mifflin *v.* Com., 5 W. & S. 461. 463. — Ed.

It was discovered, very soon after the sale, that the animal was nearly worthless. The prosecutors were proceeding to give evidence of the steps taken to return the gelding, when —

Lord Ellenborough intimated that the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. If this (he said) were to be considered to be an indictable offence, then instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats. And that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud.

The defendants were accordingly acquitted.

The *Attorney-General* and *Andrews* for the prosecution.

Nolan and *Spankie* for the defendants.

REGINA v. WARBURTON.

Crown Case Reserved. 1870.

[*Reported L. R.* 1 *C. C. R.* 274.]

Case stated by Brett, J.: —

Indictment, amongst other counts, that the prisoner had unlawfully conspired with one Joseph Warburton and one W. H. Pepys, by divers subtle means and devices, to cheat and defraud the prosecutor, S. C. Lister.

At the trial at the summer assizes, in 1870, for the West Riding of Yorkshire, at Leeds, it was found that the prisoner and Lister were in 1864 in partnership, and carried on a part of the partnership business at Urbigau, in Saxony, by there selling patent machines; that the prisoner had given notice according to the terms of the partnership agreement for a dissolution of the partnership between himself and Lister; and that upon such dissolution an account was to be taken according to the partnership agreement of the partnership property, and that according to it such property would be divided on such dissolution in certain proportions between the prisoner and Lister after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother, Joseph Warburton, who managed the partnership business at Urbigau, and with Pepys, who resided at Cologne, to make it appear by documents, purporting to have passed between Pepys and Joseph Warburton, and by entries in the partnership books or accounts, made under the superintendence of Joseph Warburton, that Pepys was a creditor of the firm for moneys advanced; and that, by reason of such documents and entries, certain partnership property was to be withdrawn and to be handed to Pepys or otherwise abstracted or kept back so as to be divided between the prisoner and Joseph Warburton and Pepys, to the exclusion of Lister from any interest or advantage in or from or in respect of it.

The jury, upon this evidence, found the prisoner guilty of the conspiracy charged, and rightly so found if in point of law such an agreement made by a partner with such an intent to defraud his partner of partnership property and to exclude him entirely from any interest in or advantage from it on such an occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership, by means of false entries in the partnership books, and false documents purporting to have passed with a supposed creditor of the firm, is a conspiracy for which a prisoner can be criminally convicted.

The offence, if it were one, was fully completed before the passing of 31 & 32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property.

The question for the opinion of the court was whether the verdict could be sustained so as to support a conviction for conspiracy in point of law.

Waddy (*Whitaker* with him) for the prisoner. To constitute a conspiracy there must be an agreement to do an illegal act or to do a legal act by illegal means. See Russell on Crimes, 4th ed. vol. iii. p. 116. Here the acts agreed upon, although doubtless immoral, are not illegal. If the agreement had been carried out, the prisoner could not have been sued at law by Lister, nor could he have been indicted for doing the agreed acts. Lindley on Partnership, 2d ed. vol. ii. p. 856. It is not an indictable offence for one partner to obtain some of the partnership money from the other partners by means of a fraudulent misstatement of existing facts. Reg. *v.* Evans, Leigh & Cave, 252; 32 L. J. (M. C.) 38. The acts contemplated by the agreement were, therefore, neither actionable nor criminal.

[COCKBURN, C J. Even assuming that no action or indictment would lie for such acts, the acts are wrongful nevertheless, and there is a remedy, viz., by proceedings in equity.]

An act which merely gives a right to proceed in equity is not an illegal act within the meaning of the definitions of conspiracy.

Maule, Q. C. (*Nathan* with him), for the prosecution was not called upon.

COCKBURN, C. J. It has been doubted sometimes whether the law of England does not go too far in treating as conspiracies agreements to do acts which, if done, would not be criminal offences. This question does not, however, arise here, as no one would wish to restrict the law so that it should not include a case like the present. It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. See Russell on Crimes, 4th ed. vol. iii. p. 116. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i. e.*, amount to a civil wrong. Here there was undoubtedly an agreement with reference to the division of the partnership property or of the partnership profits. It is equally clear that the agreement was to commit a civil wrong, because the agreement was to deprive the prisoner's partner by fraud and false pretences of his just share of the property or profits of the partnership. A civil wrong was therefore intended to Lister. The facts of this case thus fall within the rule that when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed, but a civil wrong only would be inflicted on a third party. In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences, and I think that the conviction should be affirmed.

Channell and Cleasby, BB., Keating and Brett, JJ., concurred.

Conviction affirmed.

COMMONWEALTH *v.* PRIUS.

Supreme Judicial Court of Massachusetts. 1857.

[*Reported* 9 *Gray*, 127.]

The second count of this indictment alleged that the defendants, on the 1st of March, 1856, owning a stock of goods in Lowell as partners, and having insurance thereon against fire by certain insurance companies named in the indictment, amounting in all to the sum of $10,000, "did then and there corruptly, wickedly, and unlawfully confederate, agree, combine, and conspire together, to insure and cause to be insured on said stock" certain other sums, amounting to $10,000 more, in other companies named, "by then and there falsely pretending that said stock so by said firm kept and used in their said business was then and there of a much greater value than twenty thousand dollars; and as a part of said unlawful agreement" the defendants "did then and there corruptly, wickedly, and unlawfully confederate, agree, combine, and conspire together to obtain from all said insurance companies as and for a loss to a large amount, to wit, twenty thousand dollars, by means of false pretences of a loss thereafterward to happen, with design, under pretence of a loss, to cheat and defraud all said insurance companies and each one of them of their moneys by means of said false pretences; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The defendants, being convicted in the Court of Common Pleas on this count, moved in arrest of judgment, that no offence was alleged therein. *Sanger*, J., overruled the motion, and the defendants alleged exceptions.

T. Wentworth & *P. Haggerty,* for the defendants.

J. H. Clifford (Attorney-General), for the Commonwealth.

BIGELOW, J. The second count in the indictment, on which alone the defendants were found guilty, is fatally defective. It was not a crime in the defendants to procure an over-insurance on their stock in trade. It was at most only a civil wrong. The charge of a conspiracy to do so does not therefore amount to a criminal offence. It was not a combination to effect an unlawful purpose, and no unlawful means by which the purpose was to be effected are set out in the indictment.

The residue of the count is too uncertain and indefinite to support a conviction. It amounts to nothing more than an allegation of a conspiracy to cheat and defraud the insurance companies, which is clearly insufficient. Commonwealth *v.* Shedd, 7 Cush. 514. The means by which this purpose was to be effected are not stated with such precision and certainty as to show that they were unlawful. The false pretences by which money was to be obtained from the insurance companies are not set out; and the charge of a conspiracy "to obtain money by means of false pretences of a loss thereafterward to happen," is altogether too general and vague a statement to come within the rules of criminal pleading.[1] *Judgment arrested*

SMITH *v.* PEOPLE.

SUPREME COURT OF ILLINOIS. 1860.

[*Reported* 25 *Illinois*, 17.]

THIS indictment, filed at the April Term, A. D. 1860, of the Recorder's Court, of the city of Chicago, contains two counts for conspiracy.

The first count charges, that Charles H. Schwab, John B. Smith, and Mary C. Allen, on the first day of March, A. D. 1860, at Chicago, did, between themselves, unlawfully conspire, combine, confederate, and agree together, wickedly, knowingly, and designedly, to procure, by false pretences, false representations, and other fraudulent means, one Lizzie M. Engles to have illicit carnal connection with a man, to wit, with the said Charles H. Schwab, one of the defendants aforesaid.

The second count charges, that the defendants did, then and there, (on the same day) unlawfully between themselves, combine, confederate, and agree together wickedly, knowingly, and designedly, to cause and procure, by false pretences, false representations, and other fraudulent means, one Lizzie M. Engles, then and there a minor female child, of the age of sixteen, to have illicit carnal connection with a man, to wit, with the aforesaid Charles H. Schwab.

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[1] But see Com. *v.* Fuller, 132 Mass. 563. — ED.

To this indictment the plaintiffs in error pleaded not guilty, in proper person.[1]

The jury returned with a verdict of guilty as to all of the defendants. And the defendants Smith and Schwab moved in arrest of judgment, which motion was overruled. The Recorder then proceeded to sentence defendants Smith and Schwab each to the City Bridewell, for the term of six months, or to pay a fine of $100, and one-third costs of prosecution, and the defendant Allen to be imprisoned in the City Bridewell three months.

The errors assigned were that: There is no indictable offence set forth in the indictment. The court erred in refusing to arrest the judgment.[2]

CATON, C. J. To attempt to define the limit or extent of the law of conspiracy, as deducible from the English decisions, would be a difficult if not an impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. In the former case it is not necessary to set out the means used, while in the latter it is, as they must be shown to be unlawful. But the great uncertainty, if we may be allowed the expression, is as to what constitutes an unlawful end, to conspire to accomplish which is indictable without regard to the means to be used in its accomplishment. And again, what means are unlawful to accomplish a purpose not in itself unlawful. As this indictment falls under the first class, we shall confine ourselves to that. If the term unlawful means criminal, or an offence against the criminal law, and as such punishable, then the objection taken to this indictment is good, for seduction by our law is not indictable and punishable as a crime. But by the common law governing conspiracies the term is not so limited, and numerous cases are to be found where convictions have been sustained for conspiracy to do unlawful acts, although those acts are not punishable as crimes. Nor yet would it be quite safe to say that the term unlawful as here used includes every act which violates the legal rights of another, giving that other a right of action for a civil remedy. And we are not now prepared to say where the line can be safely drawn. It is sufficient for the present case, to say that conspiracies to accomplish purposes which are not by law punishable as crimes, but which are unlawful as violative of the rights of individuals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages, beyond the damages actually proved, have in numerons instances been sustained as common law offences. The law does not punish criminally every unlawful act, although it may be a grievous offence to society. And in determining what sort of conspiracies may or may not be entered into without committing an offence punishable by the common law, regard must be had to the influence which the act, if done, would actually have upon society, without confining the inquiry to the question whether the act might itself subject the offender to criminal punishment. And most prominent among the acts branded as unlawful, although not punishable as crimes, is the very act, to accomplish which this conspiracy is charged to have been entered into. It is more destructive of the happiness of individuals and of the well-being of society, than very many others which are punishable as crimes, and the law has ever favored its punishment by exemplary damages to the parent, guardian or master of the victim of seduction, although he is often regarded as the injured party by the merest technicality. To say that it is innocent, or not a crime, for parties to band and conspire together to accomplish the destruction, by seduction, of any young girl in the community, unless it can be shown that the means to be used are unlawful, and then hold that such unlawful means must of themselves be criminal and punishable as such, would be giving a legal sanction and encouragement to such conspiracies. Under such decisions the courts, instead of being the guardians of the peace and happiness and well-being of society, would lend their sanction to its worst enemies. If there be any act which should be regarded as unlawful in the sense of the law of conspiracy, but which is not punishable as a crime, it is this very act, and so it has been and ever should be regarded by the courts. We do not hesitate to hold that a conspiracy to accomplish such an object as this, whether the means to be used be unlawful or criminal or not, is a crime at the common law, and that it is the duty of the courts to protect society against such conspiracies by their punishment. If the laws of the land will not afford such protection, then individuals will protect themselves by violence, for it is not in human nature to let such offences go unpunished in some way. Counsel say, in argument, that if we sustain this conviction no man in community can repose in security. We answer, no man who will enter into a conspiracy to accomplish so nefarious a purpose as this, should be allowed to repose in security; and if parties who thus offend are allowed to do so, then innocent and useful members of society cannot. We hold that it was not necessary to show that the means to be used by the conspirators were unlawful or criminal.

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[1] The evidence and requests to charge are omitted.

[2] The other assignments of error are omitted.

The objection that this being but a common law offence, is not punishable in this State, where we have a criminal code defining most criminal offences and prescribing their punishment, is answered by the case of Johnson *v.* The People, 22 Ill. 314. It is there shown, that our criminal code prescribes punishment for offences not enumerated, which can mean nothing but common law offences, showing conclusively that it was not the intention of the legislature to repeal that portion of the common law by implication.

We do not deem it necessary to review the instructions in detail. We have examined them and the questions made upon them, and find no error committed by the court in the instructions; nor do we think that the verdict was unsustained by the proof. The judgment is affirmed. *Judgment affirmed.*

SECTION III.

Conspiracy and other Offences against Trade.

ORDINANCE for bakers, &c., c. 10.[1] Be it commanded on the behalf of our Lord the King, that no forestaller be suffered to dwell in any town, which is an open oppressor of poor people, and of all the commonalty, and an enemy of the whole shire and country, which for greediness of his private gain doth prevent others in buying grain, fish, herring or any other thing to be sold coming by land or water, oppressing the poor and deceiving the rich, which carrieth away such things, intending to sell them more dear; the which come to merchants stranger that bring merchandise offering them to buy, and informing them that their goods might be dearer sold than they intended to sell, and an whole town or a country is deceived by such craft and subtlety. He that is convict thereof the first time shall be amerced, and shall lose the thing so bought, and that according to the custom and ordinance of the town; he that is convict the second time shall have judgment of the pillory; at the third time he shall be imprisoned and make fine; the fourth time he shall abjure the town. And this judgment shall be given upon all manner of forestallers, and likewise upon them that have given them counsel, help, or favor.

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[1] Published during the thirteenth century; the exact date is uncertain. — ED.

ARTICLES OF INQUEST.

ALL THE JUSTICES. 1352.

[*Reported Lib. Assis.* 138, *pl.* 44.]

THESE are the articles which are to be inquired of by the Inquest of Office in the King's Bench, summoned to inquire of homicides, thieves, burners of houses, ravishers of women, and of all manner of felons and of felonies, and their receivers, procurers, and maintainers, as well in the time of the King's father, as in the time of the King who now is, of escapes of thieves, &c. . . .

Likewise of those who bind others by their robes or fees to conceal the truth, and to maintain their evil emprises, &c. And *note*, that two were indicted for confederacy, each of them to maintain the other, whether their cause were true or false; and notwithstanding nothing was alleged to be put in motion, the parties were held to answer, because this thing is forbidden by the law, &c.

Likewise of conspirators, and confederates, who bind themselves together by oath, covenant, or some other alliance, that each of them will aid and sustain the other's emprise, be it false or true; and who falsely have persons indicted or acquitted, or falsely bring or maintain pleas, by means of alliance, &c. . . .

Likewise of forestallers of victual, and of purveyors of victual without being duly appraised by the vill, or those who take them without making a bargain with the persons from whom they take them, according to the statute in such case provided. . . . Likewise of merchants who by covin and alliance among themselves from year to year put a certain price on wool which is for sale in the country, so that none of them will buy or overbid another in buying wool beyond the certain price which they themselves have ordained: to the great impoverishment of the people, &c. . . .

Likewise of all manner of oppressions and grievances done to the people of our Lord the King.

THE LOMBARD'S CASE.

LONDON ASSIZES. 1368.

[*Reported Lib. Assis.* 276, *pl.* 38.]

A LOMBARD was indicted in London for concealing the customs of our Lord the King, and for divers other things; and presentment was also made against him, that he had procured and promoted the enhancing of the price of merchandize. And judgment for him was prayed because this was not forestalling, nor could it sound in forestalling; and since it did not appear from the presentment that any wrong was actually done, he should not be held to answer. And *non allocatur;* for KNIVET said, that certain persons (whom he named) came into the neighborhood of Coteswold, and in deceit of the people said that no wool could cross the sea in the next year, there were so many wars in those parts; by which they depressed the price of wool. And they were brought before the King's Council, and could not deny it; wherefore they were put to fine and ransom before the King.

And so in this case. Wherefore he pleaded not guilty, &c.

Coke, 3rd Institute, 196. It was upon conference and mature deliberation resolved by all the justices, that any merchant, subject or stranger, bringing victuals or merchandize into this realme, may sell them in grosse; but that vendee cannot sell them againe in grosse, for then he is an ingrosser according to the nature of the word, for that he buy ingrosse and sell ingrosse, and may be indicted thereof at the common law, as for an offence that is *malum in se.* 2. That no merchant or other may buy within the realme any victuall or other merchandize in grosse, and sell the same in grosse againe, for then he is an ingrosser, and punishable *ut supra;* for by this means the prices of victuals and other merchandize shall be inhaunced, to the grievance of the subject; for the more hands they passe through, the dearer they grow, for every one thirsteth after gaine, *vitiosum sitiunt lucrum.* And if these things were lawfull, a riche man might ingrosse into his hands all a commodity and sell the same at what price he will. And every practice or device by act, conspiracy, words or newes, to inhaunce the price of victuals or other merchandize, was punishable by law; and they relied much upon the statute aforesaid, *nullus forstallarius*, &c., which see before in this chapter: and that the name of an ingrosser in the reigne of H. 3 and E. 1 was not known, but comprehended within this word [*forstallarius*] *lucrum sitiens vitiosum;* and ingrossing is a branch of forestalling. And for that *forstallarius* was *pauperum depressor*, *et totius communitatis et patriae publicus inimicus*, he was punishable by the common law.

7 & 8 Vict. c. 24, sects. 1, 4. Be it enacted, &c. . . . that after the passing of this Act the several offences of badgering, engrossing, fore

stalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences.[1]

Provided always, and be it enacted, that nothing in this Act contained shall be construed to apply to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumor, with intent to enhance or decry the price of any goods or merchandize, or to the offence of preventing or endeavoring to prevent by force or threats any goods, wares, or merchandize being brought to any fair or market, but that every such offence may be inquired of, tried, and punished as if this Act had not been made.

23 Ed. 3, c. 1, 2. [Statute of Laborers.] Every man and woman of our realm of England, of what condition he be, free or bond, able in body, and within the age of threescore years, not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, nor proper land, about whose tillage he may himself occupy, and not serving any other, if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require. And take only the wages, livery, meed, or salary, which were accustomed to be given in the places where he oweth to serve, the xx year of our reigne of England, or five or six other common years next before. . . .

Item, if any reaper, mower, or other workman or servant, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or licence, before the term agreed, he shall have pain of imprisonment. And that none under the same pain presume to receive or retain any such in his service.[2]

5 Eliz. c. 4, sects. 5, 6. And be it further enacted, that no person which shall retain any servant shall put away his or her said servant, and that no person retained according to this statute shall depart from his master, mistress or dame, before the end of his or her term, upon the pain hereafter mentioned, unless it be for some reasonable and sufficient cause or matter to be allowed before two justices of peace, or one at the least, within the said county.

And that no such master, mistress or dame shall put away any such servant at the end of his term, or that any such servant shall depart from his said master, mistress or dame at the end of his term, without one quarter's warning given before the end of his said term, either by the said master, mistress or dame, or servant, the one to the other, upon the pain hereafter ensuing.[3]

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[1] See Sect. 2 of this Act for a list of the statutes dealing with these subjects — Ed

[2] This statute and later statutes to the same effect were modified by 5 Eliz. c. 4. — Ed.

[3] Repealed 38 & 39 Vict. c. 86, sect. 17. — Ed.

REX *v.* JOURNEYMAN-TAILORS OF CAMBRIDGE.

KING'S BENCH. 1721.

[*Reported* 8 *Modern*, 10.]

ONE Wise, and several other journeyman-tailors, of or in the town of Cambridge, were indicted for a conspiracy amongst themselves to raise their wages, and were found guilty.

It was moved in arrest of judgment upon several errors in the record.

Thirdly.[1] No crime appears upon the face of this indictment, for it only charges them with a conspiracy and refusal to work at so much *per diem*, whereas they are not obliged to work at all by the day but by the year, by 5 Eliz. c. 4.

It was answered, that the refusal to work was not the crime, but the conspiracy to raise the wages.

THE COURT. The indictment, it is true, sets forth that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work but for conspiring that they are indicted, and a conspiracy of any kind is illegal although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of The Tubwomen *v.* The Brewers of London.

Fifthly. This indictment ought to conclude *contra formam statuti;* for by the late statute 7 Geo. I. c. 13, journeymen-tailors are prohibited to enter into any contract or agreement for advancing their wages, &c. And the statute of 2 & 3 Edw. VI. c. 15, makes such persons criminal.

It was answered that the omission in not concluding this indictment *contra formam statuti* is not material, because it is for a conspiracy, which is an offence at common law. It is true, the indictment sets forth that the defendants refused to work under such rates, which were more than enjoined by the statute, for that is only two shillings a day; but yet these words will not bring the offence, for which the defendants are indicted, to be within that statute, because it is not the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages, for which these defendants are indicted. It is true it does not appear by the record that the wages demanded were excessive, but that is not material, because it may be given in evidence.

THE COURT. This indictment need not conclude *contra formam statuti*, because it is for a conspiracy, which is an offence at common law.

So the judgment was confirmed by the whole court *quod capiantur.*

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[1] The first, second, and fourth objections are omitted.

COMMONWEALTH *v.* HUNT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1842.

[*Reported* 4 *Metcalf*, 111.]

SHAW, C. J. The counsel for the defendants contended, and requested the court to instruct the jury, that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreements therein set forth did not constitute a conspiracy indictable by any law of this Commonwealth. But the judge refused so to do, and instructed the jury, that the indictment did, in his opinion, describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means; that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy, against the laws of this Commonwealth; and that if the jury believed, from the evidence in the case, that the defendants, or any of them, had engaged in such a confederacy, they were bound to find such of them guilty.

We are here carefully to distinguish between the confederacy set forth in the indictment, and the confederacy or association contained in the constitution of the Boston Journeymen Bootmakers' Society, as stated in the little printed book, which was admitted as evidence on the trial. Because, though it was thus admitted as evidence, it would not warrant a conviction for anything not stated in the indictment. It was proof, as far as it went, to support the averments in the indictment. If it contained any criminal matter not set forth in the indictment, it is of no avail. The question then presents itself in the same form as on a motion in arrest of judgment.

The first count set forth, that the defendants, with divers others unknown, on the day and at the place named, being workmen and journeymen, in the art and occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form, and unite themselves, into an unlawful club, society, and combination, and make unlawful by-laws, rules, and orders, among themselves, and thereby govern themselves and other workmen, in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate, and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery, and occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society, or combination, after notice given him to discharge such workmen, from the employ of such master; to the great damage and oppression, etc.

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[1] Part only of the opinion is given.

Now it is to be considered, that the preamble and introductory matter in the indictment — such as unlawfully and deceitfully designing and intending unjustly to extort great sums, etc. — is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter, which follows the averment, as to the great damage and oppression not only of their said masters, employing them in said art and occupation, but also of divers other workmen in the same art, mystery, and occupation, to the evil example, &c. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences.

Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretences. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so is to be averred and proved as the gist of the offence. But when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case, no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer, who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman, who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman. Still, it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy.

From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer, to whom they were bound by contract for a certain time, in violation of that contract; nor that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with everything stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer or continue in his employment, if such employer when free to act should engage with a workman, or continue a workman in his employment not a member of the association. If a large number of men engaged for a certain time should combine together to violate their contract and quit their employment together it would present a very different question. Suppose a farmer employing a large number of men, engaged for the year at fair monthly wages, and suppose that just at the moment that his crops were ready to harvest, they should all combine to quit his service unless he would advance their wages at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character that if done by an individual it would lay the foundation of a civil action only and not of a criminal prosecution. It would be a case very different from that stated in this count.

The second count, omitting the recital of unlawful intent and evil disposition, and omitting the direct averment of an unlawful club or society, alleges that the defendants with others unknown did assemble, conspire, confederate, and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society, or combination, called the Boston Journeymen Bootmakers' Society, or who should break any of their by-laws, unless such workmen should pay to said club, such sum as should be agreed upon as a penalty for the breach of such unlawful rules, etc.; and that by means of said conspiracy they did compel one Isaac B. Wait, a master cordwainer, to turn out of his employ one Jeremiah Horne, a journeyman boot-maker, etc. in evil example, &c. So far as the averment of a conspiracy is concerned all the remarks made in reference to the first count are equally applicable to this. It is simply an averment of an agreement amongst themselves not to work for a person who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement as to the manner in which they would exercise an acknowledged right to contract with others for their labor. It does not aver a conspiracy or even an intention to raise their wages; and it appears by the bill of exceptions that the case was not put upon the footing of a conspiracy to raise their wages. Such an agreement as set forth in this count would be perfectly justifiable under the recent English statute by which this subject is regulated. St. 6 Geo. IV. c. 129. See Roscoe Crim. Ev. (2d Amer. ed.) 368, 369.

As to the latter part of this count which avers that by means of said conspiracy the defendants did compel one Wait to turn out of his employ one Jeremiah Horne, we remark, in the first place, that as the acts done in pursuance of a conspiracy, as we have before seen, are stated by way of aggravation, and not as a substantive charge; if no criminal or unlawful conspiracy is stated, it cannot be aided and made good by mere matter of aggravation. If the principal charge falls the aggravation falls with it. State *v.* Rickey, 4 Halst. 293.

But further, if this is to be considered as a substantive charge it would depend altogether upon the force of the word "compel," which may be used in the sense of coercion, or duress, by force or fraud. It would therefore depend upon the context and the connection with other words, to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy by the defendants to compel Wait to turn Horne out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case; especially if it might be fairly construed, as perhaps in that case it might have been, that Wait was under obligation by contract for an unexpired term of time to employ and pay Horne. As before remarked, it would have been a conspiracy to do an unlawful, though not a criminal act, to induce Wait to violate his engagement to the actual injury of Horne. To mark the difference between the case of a journeyman or a servant and master mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of the Boston Glass Co. *v.* Binney, 4 Pick. 425. In that case it was held actionable to entice another person's hired servant to quit his employment during the time for which he was engaged; but not actionable to treat with such hired servant, whilst actually hired and employed by another, to leave his service and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established principle that every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word "compel." unexplained by its connection, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. It was the agreement not to work for him by which they compelled Wait to decline employing Horne longer. On both of these grounds we are of opinion that the statement made in this second count that the unlawful agreement was carried into execution makes no essential difference between this and the first count.

The third count, reciting a wicked and unlawful intent to impoverish one Jeremiah Horne and hinder him from following his trade as a bootmaker, charges the defendants, with others unknown, with an unlawful conspiracy, by wrongful and indirect means. to impoverish said Horne, and to deprive and hinder him from his said art and trade and getting his support thereby, and that in pursuance of said unlawful combination, they did unlawfully and indirectly hinder and prevent, &c. and greatly impoverish him.

If the fact of depriving Jeremiah Horne of the profits of his business by whatever means it might be done would be unlawful and criminal, a combination to compass that object would be an unlawful conspiracy, and it would be unnecessary to state the means. Such seems to have been the view of the court in The King *v.* Eccles, 3 Doug. 337, though the case is so briefly reported that the reasons on which it rests are not very obvious. The case seems to have gone on the ground that the means were matter of evidence and not of averment, and that after verdict it was to be presumed that the means contemplated and used were such as to render the combination unlawful and constitute a conspiracy.

Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not that they would introduce another baker, and on his refusal such other baker should under their encouragement set up a rival establishment, and sell his bread at lower prices, the effect would be to diminish the profit of the former baker and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to diminish his profits and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry, and yet it is through that competition that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances where each strives to gain custom to himself by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence that if criminal and indictable it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means those means must be stated in the indictment. If the same rule were to prevail in criminal which holds in civil proceedings, that a case defectively stated may be aided by a verdict, then a court might presume after verdict that the indictment was supported by proof of criminal or unlawful means to effect the object. But it is an established rule in criminal cases that the indictment must state a complete indictable offence, and cannot be aided by the proof offered at the trial.

The fourth count avers a conspiracy to impoverish Jeremiah Horne without stating any means; and the fifth alleges a conspiracy to impoverish employers by preventing and hindering them from employing persons not members of the Bootmakers' Society, and these require no remarks which have not been already made in reference to the other counts.

One case was cited which was supposed to be much in point, and which is certainly deserving of great respect. The People *v.* Fisher, 14 Wend. 1. But it is obvious that this decision was founded on the construction of the revised statutes of New York by which this matter of conspiracy is now regulated. It was a conspiracy by journeymen to raise their wages, and it was decided to be a violation of the statutes making it criminal to commit any act injurious to trade or commerce. It has, therefore, an indirect application only to the present case.

A caution on this subject suggested by the commissioners for revising the statutes of New York is entitled to great consideration. They are alluding to the question whether the law of conspiracy should be so extended as to embrace every case where two or more unite in some fraudulent measure to injure an individual by means not in themselves criminal. "The great difficulty," say they, "in enlarging the definition of this offence consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud by compelling a discovery on oath. It is a sound principle of our institutions that no man shall be compelled to accuse himself of any crime, which ought not to be violated in any case. Yet such must be the result or the ordinary jurisdiction of courts of equity must be destroyed by declaring any private fraud when committed by two, or any concert to commit it criminal." 9 Cow. 625. In New Jersey in a case which was much considered, it was held that an indictment will not lie for a conspiracy to commit a civil injury. State *v.* Rickey, 4 Halst. 293. And such seemed to be the opinion of Lord Ellenborough in The King *v.* Turner, 13 East, 231, in which he considered that the case of The King *v.* Eccles, 3 Doug. 337, though in form an indictment for a conspiracy to prevent an individual from carrying on his trade, yet in substance was an indictment for a conspiracy in restraint of trade affecting the public.

It appears by the bill of exceptions that it was contended on the part of the defendants that this indictment did not set forth any agreement to do a criminal act, or to do any lawful act by criminal means, and that the agreement therein set forth did not constitute a conspiracy indictable by the law of this state, and that the court was requested so to instruct the jury. This the court declined doing, but instructed the jury that the indictment did describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means; that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this state, and that if the jury believed from the evidence that the defendants or any of them had engaged in such confederacy they were bound to find such of them guilty.

In this opinion of the learned judge this court for the reasons stated cannot concur. Whatever illegal purpose can be found in the constitution of the Bootmakers' Society, it not being clearly set forth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial, which if properly averred would have given a different character to the indictment, they do not appear in the bill of exceptions, nor could they after verdict aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals, and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law. The exceptions must, therefore, be sustained, and the judgment arrested.

Several other exceptions were taken and have been argued; but this decision on the main question has rendered it unnecessary to consider them.

STATE *v.* DONALDSON.

SUPREME COURT OF NEW JERSEY. 1867.

[*Reported* 32 *N. J. Law*, 151.]

THIS was a motion to quash an indictment charging a conspiracy, which had been brought into this court by *certiorari.*

The substantial facts constituting the alleged crime were these, viz., that the defendants, and divers other evil disposed persons, etc., being journeymen workmen employed by Richmond Ward, John C. Little, and others, who then and there were engaged together in the manufacture of patent leather, and as curriers, maliciously, to control, injure, terrify, and impoverish their said employers, and force and compel them to dismiss from their said employment certain persons, to wit, Charles Beggan and William Pendergrast, then and there retained by their said employers as journeymen and workmen for them, and to injure said Charles and William, and without having any lawful cause of objection to said Charles and William, unlawfully did conspire, combine, confederate, and agree together to quit, leave, and turn out from their said employment, until and unless the said last-mentioned journeymen and workmen should be dismissed by their said employers. The indictment then further charged, that in pursuance of such conspiracy, they gave notice of their agreement to their said employers, and required them to discharge the said Charles and William, which being refused, they quitted their said employment, and remained away until their demand was complied with.

The motion was argued before the CHIEF JUSTICE, and Justices BEDLE and DALRIMPLE.

For the motion, *T. N. McCarter.*

For the state, *C. Parker.*

The opinion of the court was delivered by

BEASLEY, C. J. There is, perhaps, no crime, an exact definition of which it is more difficult to give than the offence of conspiracy. That a combination of persons to effect an end, itself of an indictable nature, will constitute this crime, is clear; nor is there any more doubt that, though the purpose the confederacy is designed to accomplish be not criminal, yet if the means adopted be of an indictable character, this offence is likewise committed. Thus far the limits are clearly defined, and embrace, without exception, all cases which fall within them. But when we proceed one step beyond the lines thus marked out, the cases which have been adjudged to be conspiracies appear to stand apart by themselves, and are devoid of that analogy to each other which would render them susceptible of classification. It is certain, however, that there are a number of cases, in which neither the purpose intended to be accomplished nor the means designed to be used were criminal, which have been regarded to be indictable conspiracies. And yet it is obvious that, in the nature of things, it cannot be every collusion between two or more persons to do an unlawful act, or an indifferent act by unlawful means, which will constitute an offence of a public nature; for if this were so, a large portion of the transactions which, in the ordinary course of litigation between party and party, comes before the courts, would assume a criminal aspect, in which the state would have an interest. Indeed, I think it may be said that there are, comparatively, but few cases of combinations in which indictability does not attach, either to the end in view, or to the instrumentalities devised, which are punishable by a public prosecution. It is true, that running to an extreme, in the case of The State *v.* Rickey, 4 Halst. 293, Mr. Justice Ford insisted that, up to his day, there was but a single case extant — that of Rex *v.* Cope *et al.*, 1 Strange, 144, which held that an indictment for a conspiracy would lie for a combination of two or more to commit a private injury which was not a public wrong: and he further insisted that the case referred to was erroneously decided: but Mr. Justice Ryerson did not, as is evident from the grounds upon which he rests his judgment, concur in that view; and the course of reasoning adopted by Mr. Justice Ford is now very generally admitted to be fallacious. In the case of The State *v.* Norton, 3 Zab. 44, the view of the law expressed by Mr. Justice Ford is disapproved of, and Chief Justice Green, in stating his conclusion, after an examination of the subject, remarks, "The great weight of authority, the adjudged cases, no less than the most approved elementary writers, sustain the position, that a conspiracy to defraud individuals or a corporation of their property, may, in itself, constitute an indictable offence, though the act done, or proposed to be done in pursuance of the conspiracy, be not, in itself, indictable."

The rule of law thus enunciated appears to me to be the correct one. There are a number of cases which cannot be sustained upon any other doctrine. To this class belongs the decision that it was a conspiracy to induce a young female, by false representations, to leave the protection of the house of her parent, in order to facilitate her prostitution. Rex *v.* Lord Grey, 3 Hargrave's State Trials, 519; Rex *v.* Sir Francis Deleval and others, 3 Burr. 1434. So a conspiracy to impoverish a tailor, and prevent him, by indirect means, from carrying on his trade, The King *v.* Eccles, 3 Dougl. 337. So a conspiracy to marry paupers, with a view to charge one parish and exonerate another, Rex *v.* Tarrent, 4 Burr. 2106; or to charge a man with being the father of a bastard, Rex *v.* Armstrong, 1 Vent. 304; Rex *v.* Kimberty, 1 Lev. 62; Rex *v.* Timberly, Sid. 68; or a combination to impoverish a class of persons, Rex. *v.* Sterling, 1 Lev. 125; s. c. Sid. 174. These are all cases, it will be noticed, in which the act which formed the foundation of the indictment would not, in law, have constituted a crime, if such act had been done by an individual, the combination being alone the quality of the transactions which made them respectively indictable.

I conclude, then, that there is no uncertainty in this legal topic to this extent, in addition to the principles before adverted to, that cases may occur in which the purpose designed to be accomplished becomes punitive, as a public offence, solely from the fact of the existence of a confederacy to effect such purpose. It is certainly not to be denied, however, that great practical difficulty is experienced whenever any attempt is made to lay down any general rules by which to discriminate that class of combinations which becomes thus punishable, from those which are to be regarded in their results as mere civil injuries, remediable by private suit. It may be safely said, nevertheless, that a combination will be an indictable conspiracy, whenever the end proposed, or the means to be employed are of an highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals. A careful analysis of the cases which have been heretofore adjudged, will reveal the presence of one or more of the qualities here enumerated; to this extent, therefore, they may be relied on as safe criteria whereby to test new emergencies as they may be presented for adjudication.

In view, then, of these general deductions, and guided by the decisions above cited, let us turn our attention to the particular indictment now before us.

The substantial offence charged is, that the defendants combined to compel their employer to discharge certain of their fellow-workmen, the means adopted to enforce this concession being an announced determination to quit their employment in a body and by a simultaneous act. On the argument before this court, counsel in behalf of the state endeavored to sustain the indictability of this charge, on the plea that the thing thus agreed to be done was an injury to trade, and consequently came within the express language of the statute on the subject of conspiracy. Nix. Dig. 187, § 61. But I cannot concur in this view. An act, to fall within this provision, must be one which, with directness, inflicts an injury on trade, as, for example, a combination to depress any branch of trade by false rumors. But, in the case before us, the act charged, if it could be said to injure trade at all, did so not proximately, but remotely. It is true that, at a far remove, an injury to an individual manufacturer may affect trade injuriously; but, in the same sense, so it is true, will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation. On this account, I think the indictment does not present an affair which can be comprehended by the clause of the act which, in this respect, was relied on. But as it has already been decided by this court that the statute in question has not superseded the common law, with regard to the crime of conspiracy, The State *v.* Norton, 3 Zab. 40, the question still remains to be resolved, whether the facts charged on this record do not constitute such crime upon general principles.

It appears to me that it is not to be denied, that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say, that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion: the men agree to leave simultaneously, in large numbers and by preconcerted action. We cannot close our eyes to the fact, that the threat of workmen to quit the manufacturer, under these circumstances, is equivalent to a threat, that unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion: if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law, which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another. I am unwilling to hold that a right which cannot in any event be advantageous to the employee, and which must be always hurtful to the employer, exists in law. In my opinion, this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy.

I also think this result is sustained by all the judicial opinion which has heretofore been expressed on this point. In substance, the indictment in this case is similar to that in Rex *v.* Ferguson and Edge, 2 Stark. 489. Nor were the circumstances unlike; for in the reported case, the defendants were charged at common law with combining to quit and turn out from their employment, in order to prevent their employer from taking apprentices; and although the case, after trial and conviction, was mooted in the King's Bench on points of evidence, no doubt was suggested as to the indictable nature of the offence, and the defendants were accordingly fined and imprisoned. So in Rex *v.* Rickerdyke, 1 M. & Rob. 179, the same doctrine was maintained. The indictment charged, that the defendant, with others, conspired to prevent certain hands from working in the colliery; and the evidence showed that the body of the men met and agreed upon a letter addressed to their employer, to the effect that all the workmen would strike in fourteen days unless the obnoxious men were discharged from the colliery; and Patterson, Justice, held that these workmen had no right to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. These two cases, it will be observed, sustain with entire aptness the opinion above expressed, and I have not found any of an opposite tendency. As to the case of The Commonwealth *v.* Hunt, 4 Met. 111, it is clearly distinguishable, and I concur entirely, as well with the principles embodied in the opinion which was read in the case, as in the result which was attained. The foundation of the indictment in that case was the formation of a club by journeymen boot-makers, one of the regulations of which was, that no person belonging to it should work for any master workmen who should employ any journeyman or other workman who should not be a member of such club. Such a combination does not appear to possess any feature of illegality, for the law will not intend, without proof, that it was formed for the accomplishment of any illegal end. "Such an association," says Chief Justice Shaw, in his opinion, "might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, or social condition; or to make improvements in their art; or for other purposes." The force of this association was not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position, to use the power, by a concert of action, which such position gives them, to compel their employer to a certain line of conduct. The object of the club was to establish a general rule for the regulation of its members; but the object of the combination, in the case now before this court, was to occasion a particular result which was mischievous, and by means which were oppressive. The two cases are not parallel, and must be governed by entirely different considerations.

The motion to quash should not prevail.[1]

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[1] See State *v.* Glidden, 55 Conn. 46. – ED.

CRUMP *v.* COMMONWEALTH.

SUPREME COURT OF APPEALS OF VIRGINIA. 1888.

[*Reported* 84 *Va.* 927.]

FAUNTLEROY, J.[1] The next error assigned is the action of the court in giving the instruction asked for by the Commonwealth, as follows: "If the jury believe, from the evidence, that the defendant Crump entered into an agreement with one or more of the defendants, whereby they undertook to coerce the firm of Baughman Brothers to discharge from their employment, against the will of the said firm, certain persons then in their employment, and to take into their employment certain other persons that the said Baughman Brothers did not wish to take into their employment, then they are instructed that said agreement was unlawful; and if they believe further, from the evidence, that in pursuance and to carry out said agreement, he, the defendant, threatened any of the customers of the said Baughman Brothers, they (the said persons making said agreement) would injure the business of such customers, by intimidating their customers and making them afraid to continue their patronage of the customers of the said Baughman Brothers, then they must find the defendant guilty." The instruction plainly and correctly expounds the law against unlawful combination and guilty conspiracy to interfere with, molest, break up, and ruin the legitimate, licensed business of peaceable, useful, industrious, and honest citizens, and to accomplish this end by the threat and intimidation of doing "all in the power" of the conspirators to "break up and destroy the business" of all the existing or future customers of Baughman Brothers, who should thereafter buy "anything from the said firm of Baughman Brothers, or employ them, the said Baughman Brothers, in their said business as printers." And the instruction, so far from being a mere declaration of abstract law, is a direct and proper application of the law to the case put in the indictment and made by the evidence. It is next to impracticable to extend this opinion by reciting the evidence in detail, further than we shall do when we come to consider the error assigned upon the admissibility and sufficiency of the evidence in the record to justify the verdict.

The instructions which were asked for by the defendant and refused by the court were properly refused, as they did not correctly expound the law, and were unwarranted by the evidence. And, more than the defect of having no predication in the evidence, they utterly and adroitly ignore the facts proved of the evil intent of the defendant and his confederates to do a wanton, causeless injury and ruin, to compel and coerce Baughman Brothers to give up the control and conduct of their own long-established, useful, and independent business to the absolute dictation and control of a combination of the defendant and others styling themselves "Richmond Typographical Union, No. 90;" and to do this by the obtrusion, terrorism, excommunication, and obloquy of the "boycott" against Baughman Brothers and all their customers in Richmond, Lynchburg, and throughout Virginia and North Carolina, *ad infinitum*, till they force the conquest and submission of all resistance to their demands and self-constituted management, — a reign of terror, which, if not checked and punished in the beginning by the law, will speedily and inevitably run into violence, anarchy, and mob tyranny. We come now to the main question involved in this appeal, whether the evidence set forth in this record presents a conspiracy at common law. The determination of this question is, indeed, the object sought, as we not only infer from the paltry fine of five dollars imposed by the verdict, but by the intimation in argument by the able and accomplished counsel for the defendant.

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[1] Part only of the opinion is given.

Is "boycotting," as resorted to and practised by the conspirators in this case, allowable under the laws of Virginia?

For a legal definition or explanation of the meaning and practical effect of the cabalistic word, as well as for a pertinent exposition of the law applicable to the facts of this case, we refer to the admirable opinion of Judge Wellford of the Circuit Court of the city of Richmond, in the case of Baughman Brothers *v.* Askew, Va. L J., April, No. 196, and also to the decision of the Supreme Court of Connecticut in the case of State *v.* Glidden, 55 Conn. 76. In that case the court says: "We may gather some idea of its [boycotting] real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority: 'Captain Boycott was an Englishman, an agent of Lord Erne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notice upon Lord Erne's tenants, and the tenantry suddenly retaliated, etc. His life appeared to be in danger: he had to claim police protection. . . . To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvest was brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army.'" The court proceeded to say: "If this is a correct picture, the thing we call a boycott originally signified violence, if not murder. . . . But even here, if it means, as some high in the confidence of the trades union assert, absolute ruin to the business of the person boycotted, unless he yields, then it is criminal." The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators.

In the case of State *v.* Donaldson, 32 N. J. L. 151, Chief Justice Beasley, in delivering the opinion of the court, said: "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, etc. If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business, in other respects, controlled. I cannot regard such a course of conduct as lawful."

Chief Justice Shaw, in the case of Commonwealth *v.* Hunt, 4 Met. 111, said: "The law is not to be hoodwinked by colorable pretences; it looks at truth and reality through whatever disguises it may assume. It is said that neither threats nor intimidations were used; but no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing (which the jury are quite satisfied have taken place, from all the evidence in the case), without there being any express words used by which a man should show any violent threats towards another, or any express intimidation. . . . An intention to create alarm in the mind of a manufacturer, and so to force his assent to an alteration in the mode of carrying on his business, is a violation of law:" Regina *v.* Rowlands, 5 Cox, C. C. 436, 462, 463; Doolittle *v.* Schanbacher, 20 Cent. L. J. 229.

Upon the trial of boycotters in New York, Judge Barrett said: "The men who walk up and down in front of a man's shop may be guilty of intimidation, though they never raise a finger or utter a word. Their attitude may, nevertheless, be that of menace. They may intimidate by their numbers, their pleadings, their methods, their circulars, and their devices."

It matters little what are the means adopted by combinations formed to intimidate employers, or to coerce other journeymen, if the design or the effect of them is to interfere with the rights or to control the free action of others. No one has a right to be hedged in and protected from competition in business; but he has a right to be free from wanton, malicious, and insolent interference, disturbance, or annoyance. Every man has the right to work for whom he pleases, and for any price he can obtain; and he has the right to deal with and associate with whom he chooses; or to let severely alone, arbitrarily and contemptuously, if he will, anybody and everybody upon earth. But this freedom of uncontrolled and unchallenged self-will does not give or imply a right, either by himself or in combination with others, to disturb, injure, or obstruct another, either directly or indirectly, in his lawful business or occupation, or in his peace and security of life. Every attempt by force, threat, or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression; and any and every combination for such a purpose is an unlawful conspiracy. The law will protect the victim, and punish the movers of any such combination. In law, the offence is the combination for the purpose, and no overt act is necessary to constitute it: State *v.* Wilson, 30 Conn. 507; State *v.* Donaldson, *supra*: Walker *v.* Cronin, 107 Mass. 564; Carew *v.* Rutherford, 106 Mass. 10, 15; Master Stevedores' Association *v.* Walsh, 2 Daly, 12; Walsby *v.* Auley, 3 L. T., N. S., 666; Regina *v.* Duffield, 5 Cox, C. C. 432; Parker *v.* Griswold, 17 Conn. 302; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, Gilbert *v.* Mickle, 4 Sand. Ch. 357.

A wanton, unprovoked interference by a combination of many with the business of another, for the purpose of constraining that other to discharge faithful and long-tried servants, or to employ whom he does not wish or will to employ (an interference intended to produce, and likely to produce, annoyance and loss to that business) will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society.

The recent case of State *v.* Glidden, already referred to, decided by the Supreme Court of Connecticut, is both in principle and features identical with the case under review. The Carrington Publishing Company had in their employ a number of printers known as "non-union men," or "rats." The Typographical Union, the Knights of Labor, the Trades' Council, the Cigar-makers' Union, and other affiliated secret organizations, waited upon the company and demanded that their office be made a "union office" within twenty-four hours. Upon the refusal of the company to make their office a "union office," a boycott was instituted against them, which, though not openly published as in this case, was fully proved. The court in its opinion said: "If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance, — whether law and justice will protect the business, or brute force, regardless of law, will control it; for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle, and for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more. . . . Confidence is the corner-stone of all business, — confidence that the government, through its courts, will be able to protect their rights; but if their rights [of business men] are such only as a secret, irresponsible organization is willing to give, where is that confidence which is essential to the prosperity of the country? . . . The end would be anarchy, pure and simple, and the subversion, not only of all business, but also of law and the government itself. They [defendants] had a right to request the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper argument in support of their request, but they had no right to say, 'You shall do this, or we will ruin your business.' Much less had they a right to ruin its business. The fact that it is designed as a means to an end, and that end in itself considered is a lawful one, does not divest the transaction of its criminality."

The defendant lays great stress upon the case of Commonwealth *v.* Hunt, 4 Met. 111, as authority to sustain the legality of boycotting; but there is an obvious distinction between that case and that of this defendant. That was a club or combination of journeymen boot-makers simply to better their own condition, and it had no aim or means of aggression upon the business or rights of others; they simply had regulations for themselves, and did not combine or operate for a result mischievous, meddlesome, and oppressive towards others. But, even in that case, the court, after supposing the case of a combination for the ultimate and laudable object of reducing, by mere competition, the price of bread to themselves and their neighbors, said: "The legality of such an association will, therefore, depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair and honorable means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy." Force may be operated either physically or mechanically; or it may be coercion by fear, threat, or intimation of loss, injury, obloquy or suffering.

The evidence in this case shows that while Baughman Brothers were engaged in their lawful business as stationers and printers, the plaintiff in error and the other members of the Richmond Typographical Union, No. 90, conspired to compel Baughman Brothers to make their office a "union office," and to compel them not to employ any printer who did not belong to the said union; that upon the refusal of Baughman Brothers to make their office (or business) a "union office," the plaintiff in error and others composing the said Richmond Typographical Union, No. 90, conspired and determined to boycott the said firm of Baughman Brothers, as they had threatened to do, and sent circulars to a great many of the customers of the said firm informing them that they had, "with the aid of the Knights of Labor and all the trades organizations in this city [Richmond], boycotted the establishment of Messrs. Baughman Brothers," and formally notifying the said customers that the names of all persons who should persist in trading, patronizing, or dealing with Baughman Brothers, after being notified of the boycott, would be published weekly in the Labor Herald as a "black-list," who, in their turn, would be boycotted until they agreed to withdraw their patronage from Baughman Brothers; and, accordingly, the employees of Baughman Brothers were mercilessly hounded by publication after publication, for months, in the Labor Herald (which was the boasted engine of the boycotting conspirators), whereby it was attempted to excite public feeling against them, and prevent them from obtaining even board and shelter; and the names of the customers and patrons of the said firm were published in the said sheet under the standing head of "black-list."

The length of this opinion will preclude the mention of even a tithe of these incendiary publications week after week for months; but not only Baughman Brothers and their employees and their customers, but the hotels, boarding-houses, public schools, railroads, and steamboats conducting the business travel and transportation of the city were listed and published under the obloquy and denunciation of the "black-list." One or two specimens will suffice: "Boycott Baughman Brothers and all who patronize them." "Watch out for Baughman Brothers' 'rats,' and find out where they board. It is dangerous for honest men to board in the same house with these creatures. They are so mean that the air becomes contaminated in which they breathe." "Boycott Baughman Brothers every day in the week." "Boycott Baughman Brothers, because they are enemies of honest labor." "Boycott Baughman Brothers' customers wherever you find them." "The Lynchburg boys will begin to play their hand on Messrs. Baughman's boycotted goods in a short time. The battle will not be fought in Richmond only, but in all Virginia and North Carolina will be raised the cry, 'Away with the goods of this tyrannical firm.'" "Let our friends remember it is the patronage of the Chesapeake and Ohio, Richmond, Fredericksburg, and Potomac, Richmond and Danville, and Richmond and Alleghany railroads that is keeping Baughman Brothers up." "We are sorry to see the Exchange Hotel on the black-list. There will be two thousand strangers in this city in October, none of whom will patronize a hotel or boarding-house whose name appears on that list." "The boycott on Baughman Brothers is working so good that a man cannot buy a single bristol-board from the 'rat' firm without having his name put upon the black-list." "The old 'rat' establishment is about to cave in. Let it fall with a crash that will be a warning to all enemies of labor in the future."

It was proved that the conspirators declared their set purpose and persistent effort to "crush" Baughman Brothers; that the minions of the boycott committee dogged the firm in all their transactions, followed their delivery wagon, secured the names of their patrons, and used every means short of actual physical force to compel them to cease dealing with Baughman Brothers, thereby causing them to lose from one hundred and fifty to two hundred customers, and ten thousand dollars of net profit. The acts alleged and proved in this case are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom, individual and associated, is the boon and the boasted policy and peculium of our country; but it is liberty regulated by law; and the motto of the law is *Sic utere tuo ut alienum non lædas.*

The plaintiff in error was properly convicted; and the judgment of the hustings court complained of is affirmed.

MORRIS RUN COAL COMPANY *v.* BARCLAY COAL COMPANY.

SUPREME COURT OF PENNSYLVANIA. 1871.

[*Reported* 68 *Pa.* 173.]

AGNEW, J.[1] The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit: the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forwards the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron-master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offence. "I take it," said Gibson, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief." Commonwealth *v.* Carlisle, Brightly's Rep. 40. In all such combinations where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many, what severally no one could accomplish, and even what when done by one would be innocent. It was held, in The Commonwealth *v.* Eberle, 3 S. & R. 9, that it was an indictable conspiracy for a portion of a German Lutheran congregation to combine and agree together to prevent another portion of the congregation, by force of arms, from using the English language in the worship of God among the congregation. So a confederacy to assist a female infant to escape from her father's control with a view to marry her against his will, is indictable as a conspiracy at common law, while it would have been no criminal offence if one alone had induced her to elope with and marry him. Mifflin *v.* Commonwealth, 5 W. & S. 461. One man or many may hiss an actor; but if they conspire to do it they may be punished. Per Gibson, C. J., Hood *v.* Palm, 8 Barr, 238; 2 Russel on Crimes, 556. And an action for a conspiracy to defame will be supported though the words be not actionable, if spoken by one. Hood *v.* Palm, *supra.* "Defamation by the outcry of numbers," says Gibson, C. J., "is as resistless as defamation by the written act of an individual." And says Coulter, J., "The concentrated energy of several combined wills, operating simultaneously and by concert upon one individual, is dangerous even to the cautious and circumspect, but when brought to bear upon the unwary and unsuspecting, it is fatal." Twitchell *v.* Commonwealth, 9 Barr, 211. There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence. If the conspiracy be to commit a crime or an unlawful act, it is easy to determine its indictable character. It is more difficult when the act to be done or purpose to be accomplished is innocent in itself. Then the offence takes its hue from the motives, the means, or the consequences. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy. Instances are given in The Commonwealth *v.* Carlisle, Bright. R. 40. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be, if there were no resort to artificial means; and a combination of the bakers of a town to hold up the article of bread, and by means of the scarcity thus produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one.

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[1] Only an extract from the opinion is given.

In Rex *v.* De Berenger, 3 M. & S. 67, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. The purpose itself, said Lord Ellenborough, is mischievous — it strikes at the price of a valuable commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud levelled against the public, for it is against all such as may possibly have anything to do with the funds on that particular day. Every "corner," in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty, and woe. Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus. Rex *v.* Byerdike, 1 M. & S. 179. In the case of such associations the illegality consists most frequently in the means employed to carry out the object. To fix a standard of prices among men in the same employment, as a fee bill, is not in itself criminal, but may become so when the parties resort to coercion, restraint, or penalties upon the employed or employers, or what is worse to force of arms. If the means be unlawful the combination is indictable. Commonwealth *v.* Hunt, 4 Met. 111. A conspiracy of journeymen of any trade or handicraft to raise the wages by entering into combination to coerce journeymen and master-workmen employed in the same branch of industry to conform to rules adopted by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is indictable as a misdemeanor. 3 Whart. C. L., citing The People *v.* Fisher, 14 Wend. 9. Without multiplying examples, these are sufficient to illustrate the true aspect of the case before us, and to show that a combination such as these companies entered into to control the supply and price of the Blossburg and Barclay regions is illegal, and the contract therefore void.[1]

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[1] "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves of the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy." Gurney, B., in Levi *v.* Levi, 9 C. & P. 239. — Ed.

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CHAPTER XV.

THE INDICTMENT.

SECTION I.

General Requisites of an Indictment.

2 Hawkins, Pleas of the Crown, ch. 25, Sect. 55. No periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence, as *murdravit*, in an indictment of murder; *cepit*, in an indictment of larceny; *mayhemiavit*, in an indictment of maim; *felonice*, in an indictment of any felony whatever; *burglariter*, or *burgulariter*, or else *burgalariter*, in an indictment of burglary; *proditorie*, in an indictment of treason; *contra ligeantiae suae debitum*, in an indictment of treason against the king's person.

2 Hawkins, Pleas of the Crown, ch. 25, Sect. 62. Where one material part of an indictment is repugnant to another the whole is void; for the law will not admit of such nonsense and absurdities in legal proceedings, which if suffered, would soon introduce barbarism and confusion. Also it takes off much from the credit of an indictment that those by whom it is found have contradicted themselves. And upon this ground . . . it hath been adjudged that an indictment for selling iron with false weights and measures is void, not only because it is absurd to suppose that iron could be sold by measure, but also because it is repugnant and inconsistent that it should be so sold at the same time when it was sold by weight.[1]

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[1] Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases, where the precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use; or that in indictments or other pleadings a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by anything to explain or define them. If the sense be clear, nice exceptions ought not to be regarded; in respect of which Lord Hale (2 Hale's P. C. 193) says that "more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany and the dishonor of God." — Lord Ellenborough, C. J., in Rex *v.* Stevens, 5 East, 244, 259.

2 Hawkins, Pleas of the Crown, 8th ed., ch. 25, Sects. 118, 119, 126, 127, 128. As to the ninth general point of this chapter, viz.: What ought to be the form of the caption of an indictment. I shall take it for granted that every such caption is erroneous, which doth not set forth with proper certainty both the court in which, and the jurors by whom, and also the time and place at which, the indictment was found. As to the first of these particulars, viz.: What certainty is necessary in the caption of an indictment in respect to the court before which it was found. It is certain that every such caption must shew that the indictment was taken before such a court as had jurisdiction over the offence indicted.

As to the second particular, viz.: What certainty is necessary in the caption of an indictment in respect of the jurors by whom it was found. It seems agreed that no caption of an indictment, whether found at a court-leet, or other inferior court, can be good without expressly shewing that the jurors who found it were of the county, city, or burgh, or other precinct for which the court was holden, and that they were at least twelve in number, and also that they found the indictment upon their oaths.

As to the third particular, viz.: What certainty is necessary in the caption of an indictment in respect of the time when it was found. It seems agreed that such caption must set forth a certain day and year when the court was holden before which the indictment was found.

As to the fourth particular, viz.: What certainty is necessary in the caption of an indictment in respect of the place where it was found. It seems agreed that if such caption either set forth no place at all where the indictment was found, or do not shew with sufficient certainty that the place set forth is within the jurisdiction of the court before which it was taken, [it] is insufficient.

STATE *v.* BROWN.

SUPREME COURT OF NORTH CAROLINA. 1819.

[*Reported* 3 *Murphy*, 224.]

THE indictment against the defendant was in the following words, to wit:

"The Jurors for the State, upon their oaths, present that John Brown, late of the County of Camden, shop-keeper, on the first day of February, 1817, and continually thereafter up to the time of taking this inquisition at Camden aforesaid, was, and yet is, a common Sabbath-breaker and prophaner of the Lord's day, commonly called Sunday; and that the said John Brown, on the day aforesaid, being Lord's day, and on divers other days and times, as well before as since, being Lord's day, did then and there keep and maintain a certain open shop, and on the days and times aforesaid, there sold and exposed to sale divers goods, wares, and spirituous liquors, to negroes and others, to the great damage of the good citizens of this State, and against the peace and dignity of the State."

The defendant submitted; but the court entertaining a doubt whether the facts set forth in the indictment constituted an indictable offence as therein set forth, sent the case to this court; and

HENDERSON, J., delivered the opinion of the court:—

The indictment charges that the defendant is a common Sabbath-breaker and prophaner of the Lord's day. If it had stopped here, it would certainly have been insufficient, as it would not show how, or in what manner, he was a common Sabbath-breaker and prophaner of the Lord's day. The court, upon an inspection of the record, must be able to perceive the alleged criminal act: for an indictment, as was once well observed from this bench by Judge Lowrie, is a compound of law and fact. The latter part of the indictment charges that the defendant kept an open shop and sold divers goods, wares, and spirituous liquors to negroes and others on the Sabbath. This offence, as charged, is not punishable by indictment; for if the act can be intended to be lawful, it shall be so presumed, unless it be charged to be done under circumstances which render it criminal, and be so found by a jury. For aught that appears to the contrary, this sale might have been to the lame or weary traveller, or to others to whom it was a merit to sell, instead of a crime; and nothing shall be intended against a defendant. And if this were the Sabbath-breaking spoken of in the foregoing part of the indictment, taking the whole together, the defendant well might have done all charged against him, and yet have committed no crime; and as this may have been the case, we are bound to presume it; at least, not to presume to the contrary.

The judgment must be arrested.

DAMON'S CASE.

SUPREME JUDICIAL COURT OF MAINE. 1829.

[*Reported* 6 *Maine*, 148.]

IN this case the defendant was indicted for that he, having been lawfully married at Reading in Massachusetts, in 1805, was unlawfully again married to another woman, at Farmington in this county, in 1812, the former wife being still alive; "against the peace of said State, and against the form of the statute in such case made and provided."

The defendant moved for a new trial, because, 4th, the indictment was defective.[1]

PARRIS, J. The only remaining question presented in this case is as to the sufficiency of the indictment. The case finds that the second marriage of the defendant was in this county, in 1812. Supposing it to have been proved or admitted at the trial, that at the time of the second marriage the first wife was alive (and this fact must necessarily have been established to the satisfaction of the jury), the offence set forth in the indictment was committed at that time, and consequently against the peace of the then existing government and the laws thereof. It could not have been an offence against the peace of the State of Maine, or in violation of its laws, for at that time Maine had not been invested with the sovereign power of a State. The territory was a portion of Massachusetts, and the inhabitants were amenable to the laws of that sovereignty.

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[1] Part of the case not relating to question of pleading is omitted.

Whoever commits an offence indictable either by statute or at common law is guilty of a breach of the peace of that government which exercises jurisdiction, for the time being, over the place where such offence is committed; and in setting forth the offence an omission to charge it as having been done against the peace of that government is fatal. The Queen *v.* Lane, 3 Salk. 199; 2 Ld. Raymond, 1034. It is even insufficient, if charged as against the peace generally, without naming the particular sovereignty, whose peace is alleged to have been violated. 2 Hale's P. C. 188. So, also, if it be an offence created by statute, as in this case, the indictment must allege it to have been committed against the form of the statute, or it will be fatal. 2 Mass. Rep. 116.

Now it would be preposterous to allege the offence to have been committed against a statute of the State of Maine; for at that time Maine had no statutes, and the statute touching this subject which has since been enacted by our legislature is materially different, especially in the penal part, from the statute of Massachusetts.

As the indictment, in this case, sets forth a statute offence committed in the year 1812, by a person subject to the laws of Massachusetts, in a place then under the jurisdiction of that government, it consequently must have been against the peace of that sovereignty and that only; and not being so alleged, the prosecution cannot be sustained. The authorities by which our opinion on this point is supported are: 2 Hale's P. C. 188; 2 Hawk. ch. 25, sect. 95; Yelv. 66; 4 Com. Dig. Indictment, G. 6, and Rex *v.* Lookup, 3 Burr. 1903. In the latter case, Lookup was indicted for perjury. The fact was charged to have been committed in the time of the late king, whereas the indictment concluded against the peace of the present king. After trial, conviction and sentence, Lookup brought a writ of error returnable in Parliament, when the following question was put by the lords to the judges: "whether the perjury being alleged in the indictment to have been committed in the time of the late king, and charged to be against the peace of the now king is fatal, and renders the indictment insufficient." The Lord Baron delivered the unanimous opinion of the judges in the affirmative; and upon this point the judgment of the King's Bench was reversed and the defendant discharged.

Conformably to the report of the judge who tried the cause, the verdict must be set aside and a new trial granted.

COMMONWEALTH *v.* PRAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[*Reported* 13 *Pick.* 359.]

THE defendant was indicted as follows, on the statute of 1786, c. 68, § 1.

"The jurors, &c., present that Edward Pray of Braintree, in the County of Norfolk, trader, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and thirty, and on divers other days between that day and the twentieth day of December next following, at Braintree aforesaid, did presume to be and was a common seller of wine, beer, ale, cider, brandy, rum, and other strong liquors by retail, in less quantities than twenty-eight gallons, and that delivered and carried away all at one time, *and did at said Weymouth, during all the time between the days aforesaid, commonly and habitually sell to divers persons to the jurors unknown, wine, beer, ale, cider, brandy, rum, and other strong liquors by retail, in less quantities than twenty-eight gallons, and that delivered and carried away all at one time,* he, the said Edward Pray, not being first duly licensed therefor according to law," &c.

The defendant demurred generally to the indictment.

Kingsbury, in support of the demurrer, objected to the indictment on the grounds of uncertainty and repugnancy. The allegations that the offence was committed at Braintree and at "said Weymouth," are repugnant, and the place of the offence is rendered uncertain. 2 Hale's P. C. 180; Bac. Abr. Indictment, G 4; Hawk. bk. 2, c. 25, § 83; Cholmley's case, Cro. Car. 465; Wingfield's case, Cro. Eliz. 739. The general rule is that an indictment should set forth the particular facts constituting the offence charged. There are some exceptions, as in the cases of a common barrator and a common scold, but they do not embrace the offence for which this defendant is indicted. 2 Hale's P. C. 182; Hawk. bk. 2, c. 25, § 59. The second allegation in the indictment is descriptive of the offence, and is repugnant to the first allegation, and for both of these reasons it cannot be rejected as surplusage. Rex *v.* Holt, 2 Leach, 676; s. c. 5 T. R. 446; 3 Stark. Ev. 1529; Com. Dig. Pleader, E 12; Co. Lit. 303 b; Gould's Pl. 155, c. 3, § 172.

Austin, Attorney-General, for the Commonwealth, said that the clause in the indictment printed in Italics might be rejected as surplusage; 1 Chit. Crim. Law, 238; Commonwealth *v.* Hunt, 4 Pick. 252; and that it has been the invariable practice, ever since this statute was passed, to set forth the offence in this general form, and that the case came within the reasons of the exceptions in regard to common barrators and common scolds.

MORTON, J., delivered the opinion of the court. This case comes before us on general demurrer; and the only subject for our considera-

Sec-755.23 - Indictment [illegible]

tion is the sufficiency of the indictment. It is framed upon the first section of St. 1786, c. 68. That section contains two distinct prohibitions, enforced by different penalties. The first clause provides that no person may, without being duly licensed, "presume to be a common victualler, innholder, taverner, or seller of wine, beer, ale, cider, brandy, rum, or any strong liquors, by retail," under a penalty of twenty pounds. The second clause provides that if any person shall, without license, "sell any spirituous liquors, or any mixed liquors, part of which is spirituous," he shall incur a penalty of not less than forty shillings, nor more than six pounds. The first offence consists in presuming to be a common victualler, or common seller, &c.; the second, in actually selling. Although the first offence may not be completed without committing the second, yet the second may be, without committing the first.

The indictment contains two distinct charges. The one, in general terms, that the defendant did presume to be and was a common seller, &c., — in the words of the statute. The other, that the defendant did commonly and habitually sell to divers persons to the jurors unknown, wine, &c. The first is laid with a proper *venue*, viz., "at Braintree aforesaid," Braintree having just before been described as in the County of Norfolk. In the second, the offence is alleged to have been committed "at said Weymouth;" whereas Weymouth had not before been named. This unquestionably is a mere clerical error. But it is inconsistent with the former *venue*, and clearly insufficient. Hawk, bk. 2, c. 25, § 83; 2 Hale's P. C. 180.

The next inquiry is whether this defective averment may not be rejected as surplusage. It does not contradict any other averment in the indictment; it is not descriptive of the identity of the charge, or of anything essential to it, nor does it in any degree tend to show that no offence was committed. 3 Stark. Ev. 1529; 1 Chit. Crim. Law, 238; Gould's Pl. 154, 155, and authorities there cited; Commonwealth *v.* Hunt, 4 Pick. 252.

The second allegation, embracing all between the words "all at one time," where they first occur, and the words "he the said Edward," may properly be rejected as surplusage. Indeed it must be excluded, for it contains no legal averment; and the indictment must be treated as if originally drawn without it. But as it cannot aid the indictment, so it will not injure it. *Utile per inutile non vitiatur.*

The indictment describes the offence in the very words of the statute. This usually is not sufficient. The established rules of pleading require the essential facts and circumstances to be particularly, unambiguously, and certainly stated, that the court may know whether they amount to a violation of the law, and what punishment, if any, they require. A general charge, as that a man is a common thief, common forestaller, or common champertor, &c., is clearly insufficient. Hawk. bk. 2, c. 25, § 29.

But this general rule, useful and important as it may be, is not without its exceptions; for there are classes of cases to which it does not apply. Wherever the crime consists of a series of acts, they need not be specially described, for it is not each or all the acts of themselves, but the practice or habit which produces the principal evil and constitutes the crime.

Thus, it is sufficient to charge a person with being a common barrator, or a common scold. Hawk. bk. 2, c. 25, § 59. And it is not necessary to set forth any particular acts of barratry or of scolding; for it is the general practice, and not the particular acts which constitute the offence. They go to make up the evidence of the crime, but are not the crime itself. And it is never necessary in pleadings, civil or criminal, to set forth the evidence.

There is another class of cases, which, though not very similar to the above, seem to come within the same exception. It is sufficient to charge a person generally with keeping a house of ill-fame, a disorderly house, or a common gaming house. Hawk. bk. 2, c. 25, § 57; Davis's Prec. of Indictments, 140, 198; Rex *v.* Higginson, 2 Burr. 1233. Now although all the acts which make up these general offences are in themselves unlawful, it is not necessary to set them forth. The several acts may be indicted and punished separately, but the keeping the house is a distinct offence, and as such liable to punishment.

This indictment comes within these principles. Although to make out the statute offence it may be necessary to prove particular acts, such as entertaining company or selling spirits, yet these acts are only evidence of the general charge, and may be proved, but need not be alleged.

There is also one other class of cases, well settled, as we think, which are, in principle, similar to the case under consideration. It is made the duty of towns to keep in repair all highways within their limits; and for a neglect of this duty they are liable, not only to indictment, but, if any individual injury occurs by reason of it, to a civil action. St. 1786, c. 81. In indictments and declarations on this statute, which are of almost daily occurrence, the practice never has been to set forth minutely the defects in the highway. But a general allegation, that a certain highway is out of repair, ruinous, and unsafe, has always been deemed sufficient. Hawk. bk. 2, c. 25, § 68; Davis's Prec. of Indictments, 195; Rider *v.* Smith, 3 T. R. 766.

The object of the rule requiring the charge to be particularly, certainly, and téchnically set forth, is threefold. First, to apprise the defendant of the precise nature of the charge made against him. Secondly, to enable the court to determine whether the facts constitute an offence and to render the proper judgment thereon. And thirdly, that the judgment may be a bar to any future prosecution for the same offence. 3 Stark. Ev. 1527.

The allegations remaining in this indictment entirely satisfy all these objects. They fully apprise the defendant of the nature of the charge preferred against him. When it is alleged that at a certain time he did presume to be and was a common innholder and common seller of spirits, &c., he cannot be ignorant of the offence which is imputed to him. Besides, the court, according to the modern practice, in all cases of general allegations, take care that the defendant shall not be surprised, but that he shall seasonably be furnished with such specifications and particular statements as may be necessary to enable him to prepare for his trial, and to meet all the proof which may be brought against him. It is admitted that if the second allegation were sufficient, the whole indictment would be good. Now it is apparent that this second clause gives no information as to the nature of the offence, or of the particular facts to be proved, not contained in the first.

That the indictment is sufficient to enable the court to render the proper judgment, and that it will be a bar to all future prosecutions for the same offence, we cannot doubt. In this case the time enters into the essence of the offence, and with entire certainty fixes the identity. The defendant can never again be punished for being a common seller, &c., within the time described in the indictment. But even if the identity were not proved by the record, it might, as in many other cases, be established by proof *aliunde*.

Upon the whole, the court are of opinion, that the second clause in the indictment may properly be rejected as surplusage; that the indictment, without it, contains all the allegations necessary to its support; and therefore that the demurrer must be overruled.

COMMONWEALTH *v.* HERSEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 2 *Allen*, 173.]

BIGELOW, C. J. The motion in arrest of judgment in the present case is founded on the omission to aver that the defendant, in administering poison to the deceased, did it with an intent to kill and murder. No direct authority or adjudication has been cited by the counsel for the prisoner in support of the position that such an averment is necessary or essential to the validity of the indictment. They do, however, rely on forms or precedents, which are found in text books of approved authority and in reported cases, in which the allegation that the poison was administered with intent to kill is distinctly set forth. Wharton's Precedents, (2d ed.) 123–138; Archb. Crim. Pl. (5th Amer. ed.) 432; 2 Cox, C. C. Appendix, III; Davis's Precedents, 182–186. But, on the other hand, it is certainly true that there are precedents entitled to equal respect with those cited by the prisoner's counsel, in which no such averment is made, as a separate and substantive allegation essential to the description of the crime, and distinct from the general prefatory clause, in which a general intent to kill is stated without any averment of time and place. 2 Stark. Crim. Pl. 12, 15, 18; 1 East P. C. c. 5, § 116; 3 Chit. Crim. Law, 773, 779; The

King *v.* Clark, 1 Brod. & Bing. 473; Regina *v.* Alison, 8 C. & P. 418. So far therefore as the question now raised depends on authority, it may fairly be said to be an open one. It would be giving too much force to mere precedents of forms, which often contain unnecessary and superfluous averments, to hold that a particular allegation is essential to the validity of an indictment, because it has sometimes, or even generally, been adopted by text writers or by cautious pleaders.

We are then to determine the question as one depending on the general rules of criminal pleading applicable to the description of similar offences. There can be no doubt that, in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that, because a man cannot commit a felony unless he has an evil or malicious mind or will, it is necessary to aver the guilty intent as a substantive part of the crime in giving a technical description of it in the indictment. On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that a defendant committed a criminal act, without alleging the specific intent with which it was done. In such case, the act necessarily includes the intent. Thus, in charging the crime of burglary, it is not necessary to aver that the breaking and entering a house was done with an intent to steal. It is sufficient to charge the breaking and entering and an actual theft by the defendant. The reason is, that the fact of stealing is the strongest possible evidence of the intent, and the allegation of the theft is equivalent to an averment of that intent. Commonwealth *v.* Hope, 22 Pick. 1, 5; 2 East P. C. c. 15, § 24. So in an indictment for murder by blows or stabs with a deadly weapon, it is never necessary to allege that they were inflicted with an intent to kill or murder. The law infers the intent from proof that the acts were committed, and that death ensued. The averment, therefore, of the criminal act comprehends the evil or wicked intention with which it was committed. The true distinction seems to be this: when by the common law or by the provision of a statute a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved. In such case, the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies. 1 Stark. Crim. Pl. 165. 1 Chit. Crim. Law, 233; The King *v.* Philipps, 6 East, 474; 1 Hale P. C. 455; Commonwealth *v.* Merrill, 14 Gray, 415; To illustrate the application of the rule, take the case of an indictment for an assault with an attempt to commit a rape. The act not being consummated, the gist of the offence consists in the intent with which the assault was committed. It must therefore be distinctly alleged and proved. But in an indictment for the crime of rape, no such averment is necessary. It is sufficient to allege the assault, and that the defendant had carnal knowledge of a woman by force and against her will. The averment of the act includes the intent, and proof of the commission of the offence draws with it the necessary inference of the criminal intent. The same is true of indictments for assault with intent to kill, and murder. In the former, the intent must be alleged and proved. In the latter, it is only necessary to allege and prove the act. The application of this principle to the case at bar is decisive of the question raised by the present motion. There is nothing in the nature of the crime of murder by poison to distinguish it from homicide by other unlawful means or instruments so as to render it necessary that it should be set out with fuller averments concerning the intention with which the criminal act was committed. If a person administers to another that which he knows to be a deadly poison, and death ensues therefrom, the averment of these facts in technical form necessarily involves and includes the intent to take life. It is the natural and necessary consequence of the act done, from which the law infers that the party knew and contemplated the result which followed, and that it was committed with the guilty intention to take life.

It was urged by the counsel for the prisoner, as an argument in support of the insufficiency of the indictment, that every fact stated in the indictment might have been done by the defendant, and yet he might have committed no offence; that is, that a person might administer to another that which he knew to be a deadly poison, from which death ensued, innocently and without any intent to do bodily harm. In a certain sense this is true. A physician, for example, might in the exercise of due care and skill give to his patient a medicine of a poisonous nature, in the honest belief that it would cure or mitigate disease, but which from unforeseen and unexpected causes actually causes death. And the same is true of many other cases of homicide produced by other means than poison. Take the case of a murder alleged to have been committed by stabs or cuts with a knife. Such wounds may be inflicted innocently and for a lawful purpose. A surgeon in performing a delicate and difficult operation, by a slight deflection of the knife, which the most cautious skill could not prevent, might inflict a wound which destroys life. But it has never been deemed necessary, because certain acts which cause death may be done without any wicked or criminal intent, to aver in indictments for homicide, that the person charged acted with an intent to take life. The corrupt and wicked purpose with which a homicidal act is done is sufficiently expressed by the averment that it was committed wilfully and with malice aforethought; and this allegation may be always disproved by showing that the act happened *per infortunium*, or was otherwise excusable or justifiable.

Motion in arrest of judgment overruled.

HIRN *v.* STATE.

SUPREME COURT OF OHIO. 1852.

[*Reported* 1 *Ohio St.* 15.]

BARTLEY, J.[1] It may be important to notice the question of the sufficiency of the indictment, for the purpose of settling a rule of pleading in regard to which the authorities are not clear and somewhat conflicting. This question is now relied on by the plaintiff in error, although not raised in the Common Pleas.

It is claimed that the indictment is defective on the ground that it does not contain a negative averment, that the sale of spirituous liquor charged was not for medicinal or pharmaceutical purposes. The penal offence is described or defined in the first section of the act of 1851, and at the close of the section is a proviso in these words: "Provided, that nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes."

The rule laid down by the authorities on this subject is generally defined in this manner: that when a criminal or penal statute contains an exception in the enacting clause, that exception must be negatived in the indictment; but where the statute contains provisos and exceptions in distinct clauses, it is not necessary to allege that the defendant does not come with the exceptions, nor to negative the provisos. 1 Chitty's Crim. Law, 284. In some of the authorities the negative allegation is made to depend upon the place in the statute where it occurs, 1 Term R. 141; in others upon the question whether the exception or proviso qualifies the description of the offence. In some, the rule is made to depend upon whether the exception be a matter of description in the negative, the affirmative of which would be a good excuse for the defendant, 2 Hawk. 255, 112; while in others, it is made to depend upon the distinction between a proviso in the description of the offence, and a subsequent exemption from the penalty under certain circumstances. This is Lord Mansfield's rule in Spiers *v.* Parker, 1 Term R. 86, 87.

The confusion which seems to exist in regard to this rule has arisen from the various modes adopted and the indefinite language used in defining it, and the multiplicity of forms in which exceptions, qualifications, and exemptions are introduced into statutes. What constitutes the enacting clause, in the meaning of some of the authorities, is not clear. A clause is a distinct member or subdivision of a sentence, in which the words are inseparably connected with each other in sense, and cannot, with propriety, be separated by a point; yet very frequently the language creating and describing the offence and fixing the penalty, includes several distinct clauses and sometimes a whole section.

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[1] Part of the case not relating to the question of pleading is omitted.

It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offence as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all is that without it the description of the offence would not be complete. When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, enters into and becomes a part of the description of the offence, or a material qualification of the language which defines or creates the offence, the negative allegation in the indictment is requisite. But where it is a subsequent exemption, or occurs in a separate and distinct clause or part of the statute, disconnected with the statutory description of the offence, the negative averment is unnecessary.

In the case before the court, the matter of the proviso in the first section of the act of 1851, points directly to the character of the offence, is in the same sentence with it, and made a material qualification in the statutory description of it.

It is the opinion of the majority of the court that the indictment should have contained the negative averment, that the sale of the liquor was not for medicinal or pharmaceutical purposes, and is, therefore, defective.

The judgment of the court of Common Pleas is reversed.

Thurman, J., having been of counsel for the plaintiff in error, did not sit in this case.

Corwin, J., dissented from the opinion of the court as to the sufficiency of the indictment, but concurred in the decision on the other points.

COMMONWEALTH *v.* PERRIGO.

Court of Appeals of Kentucky. 1860.

[*Reported* 3 *Metcalfe*, 5.]

Judge Duval delivered the opinion of the court: —

The indictment charges that the defendant suffered certain named persons "to play in a house, *or* on premises in the county aforesaid, then in the occupation and under the control of the said Perrigo, a game of cards, at which game of cards, played as aforesaid, money *or* property was won and lost."

This indictment was held insufficient upon demurrer.

The rule is well settled that an indictment must set forth the offence with such certainty as to apprise the defendant of the nature of the accusation upon which he is to be tried, and to constitute a bar to any subsequent proceeding for the same offence.

Tested by this rule, the indictment under consideration is obviously defective. Whether the defendant was to be tried for suffering gaming in his house, or for suffering gaming on *premises* elsewhere in the county; or whether it was for suffering a game upon which money was won or lost, or upon which property was won or lost, the defendant could not learn from anything contained in the indictment, and could not, therefore, be presumed to have been able to make any available or effectual preparation for defence against so vague and uncertain an accusation. Nor would a conviction for suffering a game for *money* to be played in his *house* have constituted a bar to a subsequent indictment for suffering a game for *property* to be played elsewhere on his *premises*.

Would it be pretended that, under the 2d section of the statute punishing crimes against the person, it would be sufficient to charge that the defendant maliciously shot at and wounded another, with a gun or other instrument, *or* that the defendant cut or stabbed such person with a knife or other deadly weapon? And yet it might, with the same propriety, be said, in support of such an indictment, that it charged but one offence; that the shooting and stabbing were but the allegation of the different modes and means by which the offence was committed, and that under the 125th section of the Criminal Code such different modes and means might be alleged in the alternative. It is clear, however, that the section referred to cannot admit of any such construction.

The judgment is affirmed.

UNITED STATES *v.* CRUIKSHANK.

SUPREME COURT OF THE UNITED STATES. 1875.

[*Reported* 92 *U. S.* 542.]

ERROR to the Circuit Court of the United States for the District of Louisiana.

This was an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement Act (16 Stat. 140), and consisted of thirty-two counts.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten, and intimidate" two citizens of the United States, "of African descent and persons of color," "with the unlawful and felonious intent thereby" them "to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose."

The *fifth* avers an intent to hinder and prevent the same persons "in the exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color" of the said persons.

The *eighth* avers an intent "to prevent and hinder" the same persons "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured" to them "by the constitution and laws of the United States."[1]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court: —

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," "for the reason that they, . . . being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In United States *v.* Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in United States *v.* Cook, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars." 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

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[1] Only so much of the case as relates to the fifth and eighth counts is printed here.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose.

This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. State *v.* Parker, 43 N. H. 83; State *v.* Keach, 40 Vt. 118; Alderman *v.* The People, 4 Mich. 414; State *v.* Roberts, 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (State *v.* Roberts); but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear — that is to say, appear from the indictment, without going further — that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

COMMONWEALTH *v.* HARRINGTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[*Reported* 130 *Mass.* 35.]

SOULE, J. The only question in this case is whether a male person who is convicted on a complaint for drunkenness, which does not allege two previous convictions of a like offence within a year, can be sentenced to any greater penalty than the payment of a fine of one dollar, which is the penalty imposed by the St. of 1880, c. 221, § 1.

It is contended, in behalf of the Commonwealth, that the greater penalty can be imposed by virtue of § 2 of the same statute, which provides that, when such person "is convicted of the offence of drunkenness, and it is proved that he has been convicted of a like offence twice before within the next preceding twelve months, he may be punished by a fine not exceeding ten dollars, or by imprisonment in any place now provided by law for common drunkards, for a term not exceeding one year;" and provides further that "it shall not be necessary in complaints under the act to allege such previous convictions."

The language of this section is broad enough to cover the case at bar, and the rulings of the judge who presided in the Superior Court when the motion for sentence was made and the evidence of the previous convictions of the defendant was produced, were in strict conformity to it.

We are of opinion, however, that the ruling was erroneous, and that the evidence ought not to have been received. It is provided by article 12 of the Declaration of Rights that no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him. When a statute imposes a higher penalty on a third conviction, it makes the former convictions a part of the description and character of the offence intended to be punished. Tuttle *v.* Commonwealth, 2 Gray, 505; Commonwealth *v.* Holley, 3 Gray, 458; Garvey *v.* Commonwealth, 8 Gray, 382. It follows that the offence which is punishable with the higher penalty is not fully and substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it. That clause of the statute, therefore, which provides that it shall not be necessary, in complaints under it, to allege such previous convictions, is inoperative and void, as being contrary to the provisions of the Declaration of Rights.

The result is, that the defendant is to be sentenced for a single offence of drunkenness.

STATE *v.* MACE.

SUPREME JUDICIAL COURT OF MAINE. 1884.

[*Reported* 76 *Maine*, 64.]

ON EXCEPTIONS.

Indictment for perjury. The verdict was guilty. A motion in arrest of judgment stated as one reason: "Because said indictment does not sufficiently charge an offence against the respondent under the constitution and laws of the State of Maine." The motion was overruled and exceptions were taken to that ruling.

The indictment was in the form prescribed by R. S. 1871, c. 122, § 5.

WALTON, J. The defendant is charged with having committed the crime of perjury "by falsely swearing to material matter in a writing signed by him." The indictment makes no mention of the character or purpose of the writing. Nor does it state what the matter falsely sworn to was. Nor does it contain any averments which will enable the court to determine that the oath was one authorized by law. The question is whether such an indictment can be sustained. We think it cannot. It does not contain sufficient matter to enable the court to render an intelligent judgment. The recital of facts is not sufficient to show that a crime has been committed. All that is stated may be true, and yet no crime have been committed. The character of the writing is not stated, nor its purpose; nor the use made, or intended to be made, of it. For aught that appears, it may have been a voluntary affidavit to the wonderful cures of a quack medicine. Such an affidavit, as every lawyer knows, could not be made the basis of a conviction for perjury. In the language of our statute defining perjury, it is only when one who is required to tell the truth on oath or affirmation lawfully administered, wilfully and corruptly swears or affirms falsely to material matter, in a proceeding before a court, tribunal, or officer created by law, that he is guilty of perjury. R. S. c. 122, § 1. The oath must be one authorized or required by law, to constitute perjury. Swearing to an extra-judicial affidavit is not perjury. And the indictment must contain enough to show that the oath was one which the law authorized or required, or it will be defective and clearly insufficient, even after verdict; for the verdict will affirm no more than is stated in the indictment; and if the indictment does not contain enough to show that perjury has been committed, a verdict of guilty will not aid it. We think the indictment in this case is fatally defective in not setting out either the tenor or the substance of the writing sworn to by the accused, to the end that the court might see whether it was one in relation to which perjury could be committed.

Besides, the writing referred to in the indictment may (and it would be strange if it did not) contain more than one statement in relation to matters of fact. The grand jury, upon the evidence before them, may have come to the conclusion that the statement in relation to one of these matters of fact was false, and thereupon voted to indict the defendant, while the traverse jury, upon the evidence before them, may have come to the conclusion that the statement in relation to that matter was true, but that some other statement contained in the writing was false, and thereupon convicted the defendant of perjury in swearing to the latter statement; and thus the defendant would be convicted upon a matter in relation to which he had never been indicted by the grand jury. Surely, an indictment which will permit of such a result cannot be sustained.

True, the form followed in this case is one established by legislative authority. But the authority of the legislature in such cases is limited. Undoubtedly the legislature may abbreviate, simplify, and in many other respects modify and change the forms of indictments; but it cannot make valid and sufficient an indictment in which the accusation is not set forth with sufficient fulness to enable the accused to know with reasonable certainty what the matter of fact is which he has got to meet, and enable the court to see, without going out of the record, that a crime has been committed. This the constitution of the State forbids; and to that instrument, the legislature as well as all other tribunals must conform. The authority of the legislature in this particular, and the extent to which it may go in establishing forms, has been judicially determined in this State, and the arguments, pro and con, need not be repeated here. We refer to State *v.* Learned, 47 Maine, 426.

The common law required indictments for perjury to be drawn with great nicety and fulness, more so, it is believed, than the purposes of justice required; and the result was that but few such indictments proved to be sufficient when subjected to a close and searching examination. To avoid this inconvenience, the legislature, in 1865, enacted two forms, which it declared should be sufficient. The first related to perjury committed by persons testifying orally before some court or other tribunal, and, although much briefer than would have answered by the strict rules of the common law, it was held sufficient in State *v.* Corson, 59 Maine, 137. The second related to perjury committed in swearing to some writing in relation to which an oath is authorized or required by law; and the sufficiency of this latter form is now for the first time before the law court for consideration; and, for the reasons already stated, and to be found more fully stated in the case cited (State *v.* Learned, 47 Maine, 426), we are forced to the conclusion that it is not sufficient; that the legislature, in its laudable desire to prune away the great prolixity of the forms required by the common law, cut too deep, and did not leave enough to meet the requirements of the constitution of the State. *Exceptions sustained. Judgment arrested.*

STATE *v.* McCARTY.

SUPREME COURT OF RHODE ISLAND. 1891.

[*Reported* 17 *R. I.* 370.]

PER CURIAM. The defendant was indicted in the Court of Common Pleas at its December term, 1890, for breaking and entering, in the day-time, the house of one Jeremiah B. Fuller, in Providence, with the intent to commit larceny therein. At the trial the prosecution called as a witness the owner of the dwelling-house, who testified that his name was Jedediah B. Fuller. When the case for the prosecution was closed, the defendant moved that the indictment be quashed because of the variance between the allegation of the owner of the house and the proof submitted. The Court overruled the motion to quash, and upon motion of the attorney-general, and against the defendant's objection, permitted the indictment to be amended by striking out the name Jeremiah and inserting the name Jedediah. The defendant excepted to the rulings of the Court of Common Pleas in the matters stated, and the jury having returned a verdict of guilty, now petitions for a new trial, upon the ground, among others, that the Court of Common Pleas had no authority to permit the amendment. We think that a new trial should be granted. The amendment to the indictment being in a matter of substance, could only properly have been made in the presence of and with the concurrence of the grand jury (1 Bish. Crim. Proc. §§ 707–711; *Ex parte* Bain, 121 U. S. 1, 7 Sup. Ct. Rep. 781); or, under Pub. St. R. I. c. 248, § 4, with the consent of the accused.

Petition granted.

STATE *v.* CAMPBELL.

SUPREME COURT OF MISSOURI. 1907.

[*Reported* 210 *Mo.* 202.]

FOX, P. J.[1] The final complaint in which the sufficiency of this indictment is challenged, that is, that it fails to comply with the constitutional requirement in its conclusion, is by far the most serious proposition disclosed by the record before us in this cause. Article 6, section 38, of the Constitution of this State provides that "all writs and process shall run and all prosecutions shall be conducted in the name of the 'State of Missouri;' all writs shall be attested by the clerk of the court from which they shall be issued; and all indictments shall conclude, 'against the peace and dignity of the State.'"

It will be observed that the conclusion to the indictment now under consideration is "against the peace and dignity of State." The complaint of learned counsel for appellant is directed against this conclusion on the ground that the word "the" is omitted immediately preceding the word "State."

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[1] Only so much of the case as discusses the question of form of indictment is given. — ED.

At the very threshold of the consideration of the proposition now under discussion there is no dispute that there must be substantial compliance with the provisions of the Constitution respecting the conclusion that all indictments shall conclude "against the peace and dignity of the State." It has been expressly ruled by this court that no formal charge of crime is sufficient without the averment of the conclusion to an indictment as contemplated by the Constitution. [State *v.* Stacy, 103 Mo. 11; State *v.* Lopez, 19 Mo. 254; State *v.* Pemberton, 30 Mo. 376.] This constitutional requirement that all indictments shall conclude "against the peace and dignity of the State," in effect is a requirement that all indictments shall point out in their conclusion that the offence as described in the main body of the indictment is "against the peace and dignity of the State" which entertains and exercises jurisdiction of the offence charged.

A number of states have a similar constitutional requirement to ours as to the conclusion of indictments or informations, and it is significant that the appellate courts of the various states having a like constitutional provision have uniformly held, where such constitutional provision has been in judgment before them, that it was essential to the validity of an indictment or information that the constitutional requirement be substantially complied with. An examination of the authorities indicates some difference in the degree of exactness required in following the constitutional language in the various states, but they are all practically uniform that there must be a substantial compliance with such constitutional requirement.

In State *v.* Hays, 78 Mo. 600, the conclusion of the indictment embraced all the words required by the Constitution, but also embraced the additional words "of Missouri." The conclusion in that case was, "against the peace and dignity of the State of Missouri." The objection urged to that conclusion was, not that the conclusion did not embrace the words prescribed by the Constitution, but that the addition of the words "of Missouri" invalidated the indictment. This objection was held by this court without merit, and this court said that "the added words are but what the constitutional language implies, and the addition in no wise enlarged, varied or changed the phrase or the sense." In other words, it was in effect that the phrase embraced in the conclusion required by the Constitution, "The State," in fact meant the State of Missouri.

To the same effect is State *v.* Schloss, 93 Mo. 361. The conclusion to the indictment in that case embraced the words required by the Constitution, but also added "contrary to the form of the statute." It was held and properly so that this contention was untenable for the reason that the mere additional words would not invalidate the indictment when the conclusion embraced the language designated by the Constitution.

In one of the leading cases, State *v.* Kean, 10 N. H. 347, the language used in the conclusion was "against the peace and dignity of our said State," instead of "the State" as required by the Constitution. It was held by the court in that case that the use of the language was not such a departure from the language required by the Constitution as to vitiate the indictment. It will be observed in that case, as well as in the Hays and Schloss Missouri cases, that while the language used in the conclusion was not identical with that prescribed by the Constitution, yet the language used did fully conform to the requirements of the Constitution by clearly indicating the State which was offended by the violation of the law which was charged in the body of the indictments.

So, in the case of Zarresseller *v.* People, 17 Ill. 101. In that case the indictment concluded "against the peace and dignity of the People of the State of Illinois." The twenty-fifth section of the fifth article of the Constitution of that State provides that all prosecutions shall be carried on "in the name and by the authority of the people of the State of Illinois," and conclude "against the peace and dignity of the same." It was very properly ruled in that case that the conclusion was the same in substance as required by the Constitution and within the spirit and meaning of the requisition.

In Anderson *v.* State, 5 Ark. 444, the indictment concluded "against the peace and dignity of the people of the State of Arkansas." The Constitution of that State required that the conclusion should be "against the peace and dignity of the State of Arkansas." It was correctly held that this slight deviation from the form prescribed in the Constitution would not invalidate the indictment.

To the same effect is State *v.* Robinson, 27 S. C. 615, where the language in the conclusion of the indictment was "the same State aforesaid," instead of "the State." It will be observed in that case that all the constitutional words were present but the words "same" and "aforesaid" were added. Clearly that case was properly decided when it held that the addition of those words did not change the sense or meaning of the clause.

To the same effect is State *v.* Pratt, 44 Tex. 93, in which the word "Texas" was added, and it was held that that additional word to the concluding language required by the Constitution should not invalidate the indictment.

In State *v.* Waters, 1 Mo. App. 7, as heretofore suggested, that court, speaking through Judge Lewis, clearly pointed out the purpose and meaning of the terms designated by the Constitution, "against the peace and dignity of the State," that is, that it was to indicate the power or authority against which the facts charged constituted an offence. In other words, that while the exact language prescribed by the Constitution need not be used, yet such terms must be used as will indicate the State against which the facts charged constitute an offence. It is announced in that case that "the general doctrine is that if the intent of the Constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not essential. It is further held that if the formula be present, other words, not perverting the meaning, will be treated as surplusage." In that case the same objection was urged against the indictment as was insisted upon in State *v.* Schloss, *supra*, that there was added to the conclusion prescribed by the Constitution "and contrary to the form of the statute in such cases made and provided by the State." It is manifest that the concluding words prescribed by the Constitution were embraced in the conclusion to the indictment in that case, therefore it was very properly held that the conclusion was sufficient.

Mr. Bishop, in his work, New Criminal Procedure (4 Ed.), vol. 1, sec. 651, after stating the ruling of some of the courts upon the proposition now under consideration, reached this conclusion. He says: "Derivable from all, and from the analogies of the law, would seem to be that unimportant words omitted from the constitutional form of the conclusion, or changed therein, will not necessarily vitiate it; but whatever alters the substance, even in what seems unimportant, will render it void."

In Lemons *v.* State, 4 W. Va. 755, the conclusion of the indictment was "against the peace and dignity of the State of W. Virginia." The Constitution of that State provided, at the time the indictment in the case was returned, that all indictments should conclude "against the peace and dignity of the State of West Virginia." It was held in that case that the abbreviation for the term "West" with the letter "W" before Virginia was not a compliance with the provisions of the Constitution and the indictment was held insufficient. This case is cited with approval by Mr. Bishop in his Criminal Procedure, and is also cited in State *v.* Waters, *supra*, and Judge Lewis in that case in no way disapproves of the West Virginia case. He simply concluded his review of the Lemons case by stating that "this was no case of surplusage; it was the rejection of a name given by the Constitution and the adoption of a different one." Subsequent to the announcement of the conclusion reached by the Supreme Court of Appeals of West Virginia in the Lemons case, heretofore cited, the Constitution was changed respecting the concluding terms of all indictments, and instead of requiring the conclusion "against the peace and dignity of the State of West Virginia," the same conclusion was required as in this State, that is, "against the peace and dignity of the State," and in State *v.* Allen, 8 W. Va. 680, the conclusion to the indictment conformed to the requirements of the former Constitution and concluded in the terms "against the peace and dignity of the State of West Virginia," instead of concluding "against the peace and dignity of the State," as required by the Constitution then in force. That case, in harmony with the rule announced by this court, correctly held that the terms of the conclusion as prescribed by the Constitution being embraced in the language used, the mere addition of the State of West Virginia would not vitiate the indictment. The Lemons case was referred to approvingly, but distinguished from the Allen case.

It may be said as to the case of Lemons *v.* State, *supra*, that from the language used by the learned judge rendering the opinion, it is susceptible of being interpreted as not being in perfect harmony with many other of the appellate courts, by reason of its requiring a too strict and literal compliance with the terms used in the Constitution; however, by the subsequent case of State *v.* Allen, *supra*, it is clearly indicated that the Virginia court is in harmony with the uniform rulings of nearly all the appellate courts.

The Constitution of Wisconsin contains a similar provision to the Constitution of this State and provides that all indictments shall conclude "against the peace and dignity of the State." In Williams *v.* State, 27 Wis. 402, the indictment in judgment before the court concluded "against the peace of the State of Wisconsin." In discussing the terms of the conclusion of the indictment in that case, Lyon, J., speaking for the Supreme Court of Wisconsin, thus treats the proposition. He said: "Art. VII., sec. 17, of the Constitution provides, that 'all indictments shall conclude against the peace and dignity of the State.' This mandate is imperative, and an indictment which does not so conclude is necessarily bad. The courts have no authority to dispense with that which the Constitution requires. The Constitutions of Virginia, Texas and Missouri contain the same provision, and it has been held by the Supreme Court of the two latter States, and by the Court of Appeals of the former, that the conclusion required by the Constitution is indispensable to the validity of the indictment," citing Com. *v.* Carney, 4 Gratt. 546; State *v.* Durst, 7 Tex. 74; State *v.* Lopez, 19 Mo. 254.

This brings us to the consideration of the two Texas cases in which the identical proposition involved in this case was in judgment before the Texas Court of Appeals in the cases of Wallace Thompson *v.* State, 15 Tex. App. 39, and in R. Thompson *v.* State, reported in the same volume by the same court, page 168. Section 12 of article 5 of the Constitution of Texas, at the time of the announcement of the decision in those two cases, made the same requirement as to the conclusion of all prosecutions, that is, that they should conclude "against the peace and dignity of the State." In those cases the definite article "the" which should immediately precede the word "State," was omitted, and it was expressly ruled by that court that in the omission of the word "the," as above indicated, there was a failure to comply with the requirement of the Constitution; that the conclusion in all prosecutions should be "against the peace and dignity of the State." It is not inappropriate to say that the Texas Court of Appeals above cited has long been recognized by both the bench and bar as one of high standing, and while the propositions involved in those two cases are not discussed at any length, yet from the recognized ability of the eminent lawyers constituting that court, the conclusion reached doubtless was not without due and proper consideration. This is indicated in the latter case of R. Thompson *v.* State, above referred to. In that case the court had reached the conclusion that the judgment of the trial court was right and had entered its order affirming the judgment, but the same fatal defect in the conclusion of the information by the omission of the definite article "the" immediately preceding "State" having been overlooked, a motion for rehearing was granted and the judgment of the trial court reversed. It is obvious that the same proposition being presented in both cases and one in which the judgment of the trial court had been affirmed, that the court fully recognized the importance of the proposition, and while the expression of their conclusions was brief, the consideration of the question was full and thorough.

Emphasizing the correctness of the conclusion reached in the two cases last cited by the Texas Court of Appeals, the learned author, Mr. Bishop, in support of the rule heretofore announced, that the omission of unimportant words from the constitutional form of the conclusion would not necessarily vitiate an indictment or information, but whatever alters the substance, even in what seems unimportant, will render it void, directs the bench and bar to consult the cases of Thompson *v.* State, 15 Tex. App. on pages 39 and 168.

In 10 Am. and Eng. Ency. Law (1 Ed.), 514, we also find in the text that where the Constitution of the State requires that all prosecutions shall conclude "against the peace and dignity of the State," the omission of the word "the" before "State," in an information, is fatal to it, citing in support of the text the cases heretofore indicated in the 15th Tex. App. at pages 39 and 168.

We have thus pointed out the views of the numerous appellate courts applicable to this question, and we are now simply confronted with the proposition as to whether or not, measured by the authorities as heretofore indicated, the conclusion to the indictment in the case at bar sufficiently conforms to the requirements of the Constitution of this State. In responding to this proposition we deem it sufficient to say that, after a careful and thorough consideration of all the authorities applicable to the subject now under discussion, we see no escape from holding that the conclusion to the indictment in this cause fails to comply with the imperative mandate of the Constitution of this State. As heretofore pointed out, the authorities are all in harmony that the conclusion to the indictment must substantially conform to the requirements of the Constitution, and in all cases where this proposition has been in judgment before the appellate courts, where the language used was not identical with the terms prescribed by the Constitution, it is significant that the courts have uniformly pointed out that the terms used were equivalent and in effect and substance embraced the conclusion required by the Constitution, and, as said by the court of appeals in State *v.* Waters, *supra*, the conclusion prescribed by the Constitution is for the purpose of indicating the power or authority against which the facts charged constitute an offence. This being true, it is plainly manifest that, the definite article "the" which should immediately precede the word "State" being omitted, the conclusion to the indictment in the case at bar falls far short of indicating the power or authority against which the facts charged in the body of the indictment constitute an offence.

While it may be conceded that the word "the" is a small one and in many instances of little importance, however, if we are to longer recognize rules in the proper interpretation of language, then we see no escape from the conclusion that the definite article "the" preceding the word "State" is absolutely essential in order to designate the particular State against which the offence is charged to have been committed. It is clear that the omission of this word not only changes the sense but the very substance of the clause, and, as was said by Mr. Bishop in the discussion of the proposition of the conclusion prescribed by the Constitution, "Whatever alters the substance, even in what seems unimportant, will render it void." While it may be said that the definite article "the" in many instances is an unimportant phrase, yet as applicable to the conclusion prescribed by the Constitution of this State, it is full of force and vitality. As was said by the learned counsel in their brief in State *v.* Skillman, 209 Mo. 408, decided at the present term of this court, "the article 'the' directs what particular thing or things we are to take or assume as spoken of. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. It is used before nouns with a specifying or particularizing effect." In the use of the definite article "the" immediately preceding "State" in the conclusion prescribed by the Constitution we have pointed out the State whose peace and dignity has been offended, and by the omission of such definite article we have a conclusion that does not designate the power or authority against which the offence is committed. "The State," in the conclusion prescribed by the Constitution of this State, means the State of Missouri, and this in substance was what was decided in the Hays case, 78 Mo. 600, heretofore cited.

If this conclusion embraced language similar to that pointed out in the cases to which we have heretofore referred, such as "against the peace and dignity of our said State," or "against the peace and dignity of State of Missouri," it might be very properly ruled that such language was at least equivalent to the language prescribed by the Constitution, for the reason that it indicated the power and authority against which the offence as charged in the body of the indictment constitutes an offence.

This case falls far short of conforming to or meeting the requirements of the rule announced by Judge Lewis in State *v.* Waters, *supra.* It was there said: "If the intent of the Constitution be responded to in this part of the indictment, a literal transcript of the formula is not essential." But in that same case it will be observed that the learned judge said that the purpose and meaning of the conclusion was to indicate the power or authority against which the facts charged constitute an offence. Therefore it is obvious that the intent of the Constitution has not been substantially responded to for the reasons heretofore suggested; that in the omission of the definite article "the" preceding "State" there is an absolute failure to indicate the power or authority against which the offence is charged to have been committed.

It is not a satisfactory solution of this proposition to say we know what was intended or meant by the conclusion in the case at bar, or that it was a mere matter of form. The proposition confronting us is not what the pleader meant to say, but what did he say, and do the terms used in concluding the indictment in this case substantially conform to the requirements prescribed by the Constitution? Constitutional requirements are not ordinarily to be regarded as mere matters of form. As was said in Cox *v.* State, 8 Tex. l. c. 306: "However much we may feel disposed to consider a matter prescribed by the Constitution ill-advised or useless — however much we may be inclined to doubt the propriety of inserting into the organic, fundamental law of the State requisites of forms with regard to procedure and practice in the courts, — the answer is, the people themselves, the source of all power and authority in a republican government, have spoken it; and with regard to their *ipse dixit*, when contained in the Constitution, which is but the expression of their sovereign will, the courts can only bow in humble obedience, and say, '*ita est scripta*.' If plain and unambiguous, no ordinary rules of construction are applicable to these expressions; their inherent, binding authority is superior to all ordinary rules."

Mr. Justice Emott in People *v.* Lawrence, 36 Barb. l. c. 186, in discussing a constitutional question, used this language: "It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative." This language was fully approved by Judge Cooley. [Cooley's Const. Lim. (3 Ed.) 82.]

In Rice *v.* State, 3 Heisk. l. c. 220, it was clearly as well as forcibly announced that an "indictment that does not conclude 'against the peace and dignity of the State' is a nullity. It is a positive injunction of the Constitution itself that such shall be the conclusion of every indictment. It is, therefore, a matter that cannot be affected by legislation, and a defect that cannot be ignored by the courts. An indictment without these words is not an accusation of crime, and not an indictment in the sense of the Constitution. No conviction upon such an indictment could be permitted to stand, and a prisoner cannot waive his rights in this respect, as it is the imperative mandate of the Constitution that all crimes shall be prosecuted by presentment or indictment, and that all indictments shall conclude 'against the peace and dignity of the State.' The conclusion 'against the peace and dignity of the State' cannot be dispensed with." [1 Green's Cr. Rep. 266.] The same doctrine is emphatically declared in Thompson *v.* Commonwealth, 20 Gratt. 724, and Carney's Case, 4 Gratt. 546.

In Nichols *v.* State, 35 Wis. 308, the court, treating the subject of the conclusion prescribed by the Constitution, said: "This formula is a mere rhetorical flourish, adding nothing to the substance of the indictment, and it is difficult to see why the mandate for its use was inserted in the Constitution. Yet it is there, and must be obeyed. We enforced obedience to it in Williams *v.* State, 27 Wis. 402. Of course, the accused cannot be possibly prejudiced or in any manner misled by the omission of the formula from an indictment, and the use of it is held necessary for the sole reason that the Constitution ordains that it shall be used."

In our opinion the conclusion prescribed by the Constitution of this State is not only one of form, but as well one of substance: "substance, because the Constitution requires it;" and, as was said by Mr. Bishop in the announcement of the rule, "whatever alters the substance, even in what seems unimportant, will render it void." Our conclusion upon this proposition is that the indictment in this cause fails to substantially comply in its conclusion with the terms prescribed by the Constitution, and therefore should be held invalid.[1]

SERRA *v.* MORTIGA.

SUPREME COURT OF THE UNITED STATES. 1907.

[*Reported* 204 *U. S.* 470.]

WHITE, J. Articles 433 and 434, found in chapter 1 of title IX of the Penal Code of the Philippine Islands, define and punish the crime of adultery. The articles referred to are in the margin.[2]

It is conceded at bar that, under the Philippine law, the offence of adultery, as defined by the articles in question, is classed as a private offence, and must be prosecuted, not on information by the public prosecutor, but by complaint on behalf of an injured party. In the

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[1] "The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." HOLMES, J., in Paraiso *v.* U. S., 207 U. S. 368, 372.

[2] ART. 433. Adultery should be punished with the penalty of prisión correccional in its medium and maximum degrees.

Adultery is committed by a married woman who lies with a man not her husband and by him who lies with her *knowing that she is married,* although the marriage be afterwards declared void.

ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

Court of First Instance of Albay, Eighth Judicial District, Philippine Islands, Adriano Mortiga, the defendant in error, as the husband of Maria Obleno, filed a complaint charging her with adultery committed with Vicente Serra, the other plaintiff in error, who was also charged. The complaint is in the margin.[1]

The defendants were arraigned, pleaded not guilty, were tried by the court without a jury and were convicted. The court stated its reasons in a written opinion, analyzing the testimony and pointing out that all the essential ingredients of the crime of adultery, as defined by the articles of the penal code already referred to, were shown to have been committed. The accused were sentenced to pay one-half of the costs and to imprisonment for two years, four months and one day. The record does not disclose that any objection was taken to the sufficiency of the complaint before the trial. Indeed, it does not appear that by objection in any form, directly or indirectly, was any question raised in the trial court concerning the sufficiency of the complaint. An appeal was taken to the Supreme Court of the Philippine Islands. In that court error was assigned on the ground, first, that "the complaint is null and void because it lacks the essential requisite provided by law;" and second and third, because it did not appear from the proof that guilt had been established beyond a reasonable doubt. The conviction was affirmed. The assignment of error, which was based on the contention that the conviction was erroneous because the complaint did not sufficiently state the essential ingredients of the offence charged, was thus disposed of by the court in its opinion: "The objections to the complaint, based upon an insufficient statement of the facts constituting the offence, cannot be considered here, because they were not presented in the court below. United States *v.* Sarabia, 3 Off. Gaz. No. 29."

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[1] The United States of America,
Philippine Islands, Eighth Judicial District:
In the Court of First Instance of Albay.

The United States and Macario Mercades, in Behalf of Adriano Mortiga,
v.
Vicente Serra and Maria Obleno.

The undersigned, a practicing attorney, in behalf of Adriano Mortiga, the husband of Maria Obleno, accuses Vincente Serra and the said Maria Obleno of the crime of adultery, committed as follows:

That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided.

(Signed) MACARIO MERCADES,
Attorney at Law.
(Signed) ADRIANO MORTIGA.

ALBAY, February 24, 1904.

Sworn and subscribed to before me this 24th day of February, 1904.

(Signed) F. SAMSON, *Clerk.*

Witnesses: ADRIANO MORTIGA.
BERNARDO MORTIGA.
EULALIO MORTIGA.
PLACIDO SOLANO.
CASIMIRA MARIAS.

The assignments, based on the insufficiency of the proof to show guilt beyond a reasonable doubt, were disposed of by an analysis of the evidence which the court deemed led to the conclusion that all the statutory elements of the crime were proven beyond a reasonable doubt. An application for a rehearing, styled an exception, was made, in which it was insisted that it was the duty of the court to consider the assignment based on the insufficiency of the complaint, since not to do so would be a denial of due process of law. The rehearing was refused, and the sentence imposed below was increased to three years, six months and twenty-nine days, on the ground that this was the minimum punishment provided for the offence.

The errors assigned on this writ of error and the propositions urged at bar to support them are confined to the assertion that the refusal of the court below to consider the assignment of error concerning the insufficiency of the complaint amounted to a conviction of the accused without informing them of the nature and character of the offence with which they were charged, and was besides equivalent to a conviction without due process of law. It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands, 32 Stat. 691, 692, that guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment, the twice in jeopardy clause of the Fifth Amendment, and the substantial guarantees of the Sixth Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. Kepner *v.* United States, 195 U. S. 100.

For the purpose, therefore, of passing on the errors assigned we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the bill of rights expressed in the amendments to the Constitution of the United States. Turning to the text of the articles of the Philippine penal code upon which the prosecution was based, it will be seen that an essential ingredient of the crime of adultery, as therein defined, is knowledge on the part of the man charged of the fact that the woman with whom the adultery was committed was a married woman. Turning to the complaint upon which the prosecution was begun, it will be at once seen that it was deficient, because it did not specify the place where the crime was committed, nor does it expressly state that Vicente Serra, the accused man, knew that Maria Obleno, the woman accused, was at the time of the guilty cohabitation a married woman. It results that there were deficiencies in the complaint which, if raised in any form in the trial court before judgment, would have required the trial court to hold that the complaint was inadequate. But the question for decision is not whether the complaint, which was thus deficient, could have been sustained, in view of the Constitutional guarantees, if a challenge as to its sufficiency had been presented in any form to the trial court before final judgment, but whether, when no such challenge was made in the trial court before judgment, a denial of the guarantees of the statutory bill of rights arose from the action of the appellate court in refusing to entertain an objection to the sufficiency of the complaint because no such ground was urged in the trial court. Thus reducing the case to the real issue enables us to put out of view a number of decisions of this court referred to in the margin,[1] as well as many decided cases of state courts referred to in the brief of counsel, because they are irrelevant, since all the former and, if not all, certainly all of the latter, concern the soundness of objections made in the trial court, by the accused, to the sufficiency of indictments or informations.

In *Ex parte* Parks, 93 U. S. 18, the case was this: The petitioner Parks applied to this court for a writ of *habeas corpus*. He had been convicted and sentenced for the crime of forgery in a District Court of the United States. The ground relied upon for release was that the indictment stated no offence. The writ was discharged. Speaking through Mr. Justice Bradley, it was said:

"But the question whether it was not a crime within the statute was one which the District Court was competent to decide. It was before the court and within its jurisdiction.

. . . .

"Whether an act charged in an indictment is or is not a crime by the law which the court administers [in this case the statute law of the United States], is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy, after final judgment, unless a writ of error lies to some superior court, and no such writ lies in this case."

In United States *v.* Ball, 163 U. S. 662, an attempt was made to prosecute for the second time one Millard H. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others, who had been convicted and who had been jointly prosecuted with Ball. Reversing the court below, the plea of *autrefois acquit*, relied on by Ball, was held good. It was pointed out that the acquittal of Ball upon the defective indictment was not void, and, therefore, the acquittal on such an indictment was a bar. This case was approvingly cited in Kepner *v.* United States, 195 U. S. 100, 129. It being then settled that the conviction on a defective indictment is not void, but presents a mere question of error to be reviewed according to law, the proposition to be decided is this: Did the court below err in holding that it would not consider whether the trial court erred because it had not decided the complaint to be bad, when no question concerning its sufficiency was either directly or indirectly made in that court? Thus to understand the proposition is to refute it. For it cannot be that the court below was wrong in refusing to consider whether the trial court erred in a matter which that court was not called upon to consider and did not decide. Undoubtedly, if a judgment of acquittal had resulted it would have barred a further prosecution, despite the defective indictment. Kepner *v.* United States, *supra.*

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[1] United States *v.* Cook, 17 Wall. 168, 174; United States *v.* Carll, 105 U. S. 611; Dunbar *v.* United States, 156 U. S. 185; Cochran & Sayres *v.* United States, 157 U. S. 286; Markham *v.* United States, 160 U. S. 319.

But it is said the peculiar powers of the Supreme Court in the Philippine Islands take this case out of the general rule, since in that court on appeal a trial *de novo* is had even in a criminal case. But as pointed out in the Kepner case, whilst that court on appeal has power to reexamine the law and facts, it does so on the record and does not retry in the fullest sense. Indeed, when the power of the court below to review the facts is considered that power, instead of sustaining, refutes the proposition relied on. Thus the proposition is that the court should have reversed the conviction because of the contention as to the insufficiency of the complaint, when no such question had been raised before final judgment in the trial court, and when, as a necessary consequence of the facts found by the court, the testimony offered at the trial without objection or question in any form established every essential ingredient of the crime. In other words, the contention is that reversal should have been ordered for an error not committed and when the existence of injury was impossible to be conceived, in view of the opinion which the court formed on the facts in the exercise of the authority vested in it on that subject. *Affirmed.*

Mr. Justice Harlan dissents.

SECTION II.

Statement of the Crime.

2 Hawkins, Pleas of the Crown, ch. 25, Sects. 57, 59.

The special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the indictors have not gone upon insufficient premises. And upon this ground it seems to be agreed that an indictment finding that a person hath feloniously broken prison, without shewing the cause of his imprisonment, &c., by which it may appear that it was of such a nature that the breaking might amount to felony, is insufficient. . . . Also it seems that an indictment of perjury, not shewing in what manner and in what court the false oath was taken, is insufficient, because for what appears it might have been extrajudicial, &c.

Regularly every indictment must either charge a man with some particular offence, or else with several of such offences, particularly and certainly expressed, and not with being an offender in general. For no one can well know what defence to make to a charge so uncertain, or to plead it either in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation, are the same of which the indictors have accused him; neither can it judicially appear to the court, what punishment is proper for an offence so loosely expressed.

2 Rolle's Abridgement, 79. An indictment of a man that he is a common forestaller, without alleging anything certain, is not good, because it is too general. 29 Ass. 45, adjudged. See 3 E. 2, *action sur le statut*, 26. So an indictment that he is a common thief, without more, is not good. 29 Ass. 45; 22 Ass. 73, 3 E. 2, *action sur le statut*, 26. So an indictment for champerty is not good without more. 29 Ass. 45. So an indictment for conspiracy is not good without more. 29 Ass. 45. So an indictment for confederacy is not good without more. *Contra*, 29 Ass. 45, but *quære*. An indictment of a man for that he is a common misfeasor is not good, because it is too general. 22 Ass. 73. So an indictment that he is *communis pacis Domini Regis perturbator, ac diversas lites & discordias tam inter vicinos suos quam inter diversos ligeos & subditos domini Regis apud W. in comitatu predicto injuste excitavit moverit & procuravit, in magnum dispendium & perturbationem vicinorum suorum predictorum & aliorum subditorum domini Regis in comitatu predicto* is not good, because too general. M. 6 Car. B. R. *per Curiam*. Indictment quashed in Periam's case.

REX *v.* LEDGINHAM.

KING'S BENCH. 1669.

[*Reported* 1 *Mod.* 288.]

INFORMATION setting forth that he was lord of the manor of Ottery St. Mary, in the county of Devon, wherein there were many copyholders and freeholders, and that he was a man of an unquiet mind, and did make unreasonable distresses upon several of his tenants, and so was *communis oppressor et perturbator pacis.*

It was proved at the trial that he had distrained four oxen for threepence, and six cows for eight-pence, being amercements for not doing suits of court, and that he was *communis oppressor et perturbator pacis.*

The defendant was found guilty. But it was moved in arrest of judgment that the information is ill laid:

First, It is said he disquieted his tenants, and vexed them with unreasonable distresses. It is true, that is a fault, but not a fault punishable in this way; for by the statute of Marlebridge, c. 4. 2. Inst. 106, 7, he shall be punished by grievous amercements; and where the statute takes care for due punishment, that method must be observed.

Secondly, As to the matter itself, they do not set forth how much he did take, nor from whom; so that the Court cannot judge whether it is unreasonable or no, nor could we take issue upon them.

Thirdly, As to the *communis oppressor et perturbator pacis*, they are so general, that no indictment will lie upon them; as in Cornwall's case, Jones, 302, which indeed goeth to both the last points.

TWISDEN, J. *Communis oppressor*, &c., is not good: such general words will never make good an indictment, save only in that known case of *a barrator;* for "*communis barrectator*" is a term which the law takes notice of, and understands; it is as much, as I have heard judges say, as "a common knave," which contains all knavery. For the other point, *an information* will not lie for taking outrageous distresses. It is a private thing, for the which the statute gives a remedy, viz. by an action upon the statute *tam quam.*

PER CURIAM. It is naught. — *Adjournatur.*

COMMONWEALTH *v.* NEWBURY BRIDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1829.

[*Reported* 9 *Pick.* 142.]

THE indictment in this case recites that by a statute passed March 4, 1826 (St. 1825, c. 164) James Prince and others were incorporated by the name of The Proprietors of the Newburyport Bridge, and that by the second section it is enacted that there shall be a draw not less than thirty-eight feet wide, and a suitable pier on each side of the bridge at the draw. The indictment then alleges that the defendants, on and from the 1st of January, 1828, to the taking of this inquisition, "have neglected and still do neglect to provide a suitable pier on each side of the said bridge at the said draw, according to the requirement of the act aforesaid, but have left the said bridge altogether destitute of any pier at the said draw, by means whereof all vessels and river craft, having masts higher than will readily pass under the said draw, are obstructed, hindered, and altogether prevented from passing said bridge, to the common nuisance," &c.

At the trial, before PUTNAM, J., the defendants objected that the indictment was found too soon, inasmuch as the three years allowed them by the act, for completing the bridge, had not expired when the indictment was found. They admitted that they had taken toll of passengers for upward of a year. The objection was overruled.

A verdict against the defendants was taken, subject to the opinion of the whole court.

The defendants also moved in arrest of judgment, because it is not alleged in the indictment that any bridge had been built.

PER CURIAM. The answer to the first objection is that the defendants completed the bridge and took toll; and if so, we think they were bound to provide the means prescribed by the statute, to enable vessels to pass with convenience through the draw.

But we think the objection that the indictment does not allege that any bridge has been built is fatal. It may indeed be inferred by any common reader that there was a bridge; but no lawyer, considering that inferences are not to be made in criminal cases, would say it appears that a bridge had been built. There ought to have been an express allegation to that effect. *Indictment quashed.*

COMMONWEALTH *v.* BEAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[*Reported* 11 *Cush.* 414.]

THE defendant was indicted upon the Rev. Sts. c. 126, § 42, which enacts that every person who shall "maliciously or wantonly break the glass or any part of it, in any building not his own, or shall maliciously break down, injure, mar, or deface any fence belonging to or inclosing lands not his own, or shall maliciously throw down or open any gate, bars, or fence, and leave the same down or open, or shall maliciously and injuriously sever from the freehold of another any produce thereof, or anything attached thereto, shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding one hundred dollars." The indictment averred that the defendant, "with force and arms, wilfully, maliciously, wantonly, and without cause, did break and destroy the glass, to wit, two panes of glass of the value of ten cents each, in a certain building there situate, not his own, but which building then and there belonged to and was the property of one Dorcas B. Prentice, &c."

After a verdict of guilty, the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own.

METCALF, J. It is admitted by the counsel for the Commonwealth, that the section of the statute, on which this indictment is framed, was intended to punish the malicious and wanton breaking of glass which is part of a building. And it is argued by him, that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in a statute may be, and not unfrequently must be, ascertained by examination of the context. In the present case, it is from the context that the words "glass in a building" are understood, on all hands, to mean glass which is part of a building. But the court in ascertaining the offence with which the defendant is charged, cannot look beyond the words of the indictment itself. If those words do not sufficiently charge the offence which the statute was meant to punish, the indictment is fatally defective. 2 Hawk. c. 25, § 111; Commonwealth *v.* Slack, 19 Pick. 304; Commonwealth *v.* Clifford, 8 Cush. 215; Commonwealth *v.* Stout, 7 B. Monr. 247. We are, therefore, of opinion that the indictment in this case will not sustain a judgment against the defendant. For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.

Judgment arrested.

STATE *v.* RUSSELL.

SUPREME COURT OF RHODE ISLAND. 1884.

[*Reported* 14 *R. I.* 506.]

EXCEPTIONS to the Court of Common Pleas.

May 22, 1884. DURFEE, C. J. The exceptions raise only one question, namely: Is a complaint under Pub. Stat. R. I. cap. 244, § 22, against a woman for being a common night-walker sufficient if it simply charges her with being a common night-walker without alleging particular acts? It is well settled that for the offence of being a common scold or a common barrator such a charge is sufficient. The reason is, the offence does not consist of particular acts but of an habitual practice evidenced by a series of acts. It may be argued that if a vicious practice constitutes the offence, then the practice ought to be alleged descriptively in the complaint or indictment. The answer is, the words "common scold" and "common barrator" are words having a technical meaning in the law, and that they import *ex vi terminorum* all that would be expressed if the practice were so alleged. In State *v.* Dowers, 45 N. H. 543, the same reasoning was held to be applicable where the offence is the offence of being a common night-walker, and in that case it was decided that it was enough to charge the offender with being a common night-walker. We think the decision was correct. The words "a common night-walker" are words having a technical meaning in the law, and it would therefore be superfluous to spread their definition on the record. If, for the purposes of defence, the accused needs more definite information than the record affords, she should ask for a bill of particulars, which, of course, in so far as the offence is capable of being particularized, ought to be and would be supplied. Wharton's Crim. Plead. & Prac. § 155; Commonwealth *v.* Davis, 11 Pick. 432; Commonwealth *v.* Pray, 13 Pick. 359; Commonwealth *v.* Wood, 4 Gray, 11.

Exceptions overruled.

SECTION III.

Particular Allegations.

(*a*) NAME.

REX *v.* ———.

OLD BAILEY. 1822.

[*Reported Russ. & Ry.* 489.]

THE prisoner was indicted at the Old Bailey sessions in January, 1822, by the description of a person whose name was to the jurors unknown. The offence with which he was charged was that of publishing a blasphemous and seditious libel.

It appeared that, when apprehended, he refused to declare his name before the magistrate, and the prosecutors, not being able to discover his name, indicted him as a man whose name was unknown to the jurors. When called to the bar, the indictment was read to him, and he then refused to plead, and was remanded. At the following sessions, in the month of February, the prisoner was again called to the bar and by the advice of his counsel put in a demurrer in writing to the indictment. The prosecutors had time given them until the next morning to reply; but before they could do so the prisoner, by his counsel, moved the court to be permitted to withdraw his demurrer, which was granted: and being then called on for his plea, he pleaded not guilty; and being told that he must plead by some name, he refused to give in any name. The learned Recorder was of opinion that his plea could not be received without a name, and the prisoner was again remanded for want of a plea. At the following sessions he was again called on to plead, and again pleaded not guilty; but refused to put in that plea by any name. He was again told that the court could not receive his plea unless he would plead by some name; and, as he persevered in his refusal, he was again remanded.

As this case appeared to be without precedent, and might materially affect the administration of justice, the learned Recorder requested the opinion of the Judges upon the following points: first, whether the prisoner could be admitted to put a plea on the record without a name; secondly, whether such a plea should be treated as a mere nullity, and the prisoner be remanded from time to time, as in contempt for not pleading; thirdly, whether the refusal to plead by name would entitle the court to enter up judgment by default; and, fourthly, whether, in case the prisoner should ultimately plead by name, the court could proceed to try him upon this indictment or should quash the indictment as defective, and direct a fresh indictment to be preferred against him by the name by which he might plead.

In Trinity term, 1822, this case being presented for consideration, some of the learned Judges, before it was discussed, suggested that the prisoner might be indicted as a person whose name was unknown, but who was personally brought before the jurors by the keeper of the prison. An indictment was preferred accordingly, and the prisoner was convicted.

REGINA *v.* JAMES.

CENTRAL CRIMINAL COURT. 1847.

[*Reported* 2 *Cox C. C.* 227.]

THE indictment charged the prisoner with assaulting and stealing from a female "two rings, &c., the property of Jules Henry Steiner."

The female was the wife of the owner of the property, and stated that, to the best of her knowledge, her husband's name was Henry Jules Steiner, and not Jules Henry Steiner.

POLLOCK, C. B., held the misnomer fatal; and the prisoner was acquitted.

REGINA *v.* WILSON.

CROWN CASE RESERVED. 1848.

[*Reported* 2 *Cox C. C.* 426.]

THE prisoner was convicted at Liverpool during the last Winter Assizes, before Coltman, J., who respited judgment and reserved the following case: —

The prisoner was tried before me at the last Special Commission for Liverpool.

The indictment in the first count charged that on &c., at &c., the said E. Wilson did forge a certain warrant and order for the payment of money, which said warrant and order for payment of money is as follows; that is to say,—

> "No. LIVERPOOL, December 8, 1847.
> "To the cashiers of the Liverpool Borough Bank:
> "Pay ——— or bearer two hundred and fifty pounds.
> "£250 0*s.* 0*d.* JOHN MCNICOLE & CO."

with intent to defraud one John McNicole.[1]

It was objected, on behalf of the prisoner, that the signature of the prosecutor to the cheque, as set out in the indictment, being John McNicole and Co., and the signature to the cheque proved, John McNicoll, there was a variance. I, however, overruled the objection, being of opinion that the substituting of the letter "e" for "l" did not make it a different name. See Williams *v.* Ogle, 2 Str. 889; Aleberry

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[1] Part of the case, not involving the question of misnomer, is omitted.

v. Walby, 1 Str. 231; Reg. *v.* Drake, 2 Salk. 660; Rex *v.* Beach, Cowp. 230; Rex *v.* Hart, 1 Leach, 145.

The jury found the prisoner guilty; but, entertaining some doubt whether the conviction was right, I forbore to pass sentence on him, and request the opinion of the judges thereon.

W. B. Brett, for the prisoner. — Upon the point of variance the law is clear; and the only question is, whether the court can say that the two names are so identical in sound that no person could be misled.

Conviction affirmed.

REGINA *v.* DAVIS.

CROWN CASE RESERVED. 1851.

[*Reported* 5 *Cox C. C.* 237.]

THIS case was reserved by the Dorsetshire Sessions.

The prisoner was indicted for stealing the goods of Darius Christopher. The evidence proved the prosecutor's name to be Tryus Christopher. The chairman ruled that, in Dorsetshire, Darius and Tryus were *idem sonantia*, but requested the opinion of the judges upon the correctness of that ruling. When this case came on to be heard, on the 8th February, before Jervis, C. J., Alderson, B., Williams, J., Platt, B., and Martin, B., the court intimated that it was a question for the jury, and directed the case to be sent back, in order that it might be stated whether the question had been left to the jury. The case was now returned, with a statement that the question of variance was not left to the jury.

LORD CAMPBELL, C. J. — This conviction must be reversed. If it is put as a matter of law, it is quite impossible for this court to say that the two words are *idem sonantia*. The objection is said to have been taken in arrest of judgment; but I never heard of such a ground for arresting the judgment since the great case of Stradley *v.* Styles.

COLERIDGE, J. — No doubt a Dorsetshire jury would have thought the words *idem sonantia*. *Conviction reversed.*

COMMONWEALTH *v.* PERKINS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1823.

[*Reported* 1 *Pick.* 388.]

THE defendant being indicted by the name of Thomas Perkins, junior, for a nuisance under the statute against gaming, pleaded in abatement, at April term, 1822, of the Municipal Court, that his name was Thomas Hopkins Perkins. The county attorney demurred generally, and there was a judgment of *respondeas ouster,* a trial upon the general issue, and an appeal to this Court.

PER CURIAM. It is said on behalf of the Commonwealth that *junior* is no part of the name. This is true, but another objection to the indictment is, that the defendant is called *Thomas* instead of *Thomas Hopkins.* In 5 D. & E. 195, a person was sued by the Christian name *James Richard* instead of *Richard James,* and it was held a misnomer on account of the transposition. The indictment must give the defendant his right Christian name. *Defendant discharged.*

STATE *v.* LIBBY.

SUPREME JUDICIAL COURT OF MAINE. 1907.

[*Reported* 103 *Me.* 147.]

SPEAR, J. Numbers 264–265–266–279 and 280, all against the above named respondent, come from the Superior Court for Kennebec County, September term, 1905, on exceptions.

These are all indictments found against C. H. Libby for a violation of the law against the sale of intoxicating liquors. The respondent seasonably filed a plea in abatement in proper form and averred that his name was Cyrille H. Libby and not C. H. Libby, as in the indictment alleged. The State by the County Attorney filed a replication that "The said Cyrille H. Libby who appears to said indictment, is the same person against whom said indictment was presented, and is, and at the time of finding said indictment was, called and known as well by the name of C. H. Libby, as by the name of Cyrille H. Libby; and this he prays may be inquired of by the country." To this replication the defendant demurred and the County Attorney for the State joined the demurrer. The demurrer was overruled and the replication adjudged good. The demurrer admitted all the facts stated in the replication. The only question therefore presented by the exceptions is, if a person is as well known by the initials C. H. as by the name Cyrille H., can he be properly indicted in the name of the initials?

In Robbins *v.* Swift, 86 Maine, 197, it was held: "Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname." If, therefore, the letters of the alphabet or initials may be used to distinguish different persons of the same surname, and the respondent admits that he is as well known by the letters of the alphabet or the initials as by his full Christian name, we can discover no logical reason why the indictment is not sufficient. Certainty is the object aimed at in requiring the insertion of correct names in an indictment, and we know of no way in which greater certainty could be attained than by the admissions of the respondent, himself, as disclosed by the pleadings in this case.

Exceptions overruled.

SECTION III. (*continued*).

(*b*) Time and Place.

SIR HENRY VANE'S CASE.

King's Bench. 1663.

[*Reported Kelyng*, 14.]

Memorandum, That in Trinity Term, 14 Car. 2, Sir Hen. Vane was indicted at the King's Bench for compassing the death of King Charles the 2d, and intending to change the kingly government of this nation; and the overt acts which were laid were, that he with divers other unknown persons did meet and consult of the means to destroy the king and government; and did take upon him the government of the forces of this nation by sea and land, and appointed colonels, captains, and officers, and the sooner to effect his wicked design, did actually in the County of Middlesex raise war.[1]

Although the treason of compassing the king's death was laid in the indictment to be the 30th of May, 11 Car. 2, yet upon the evidence it appeared, that Sir Hen. Vane, the very day the late king was murdered, did sit in Council for the ordering of the forces of the nation against the king that now is, and so continued on all along until a little before the king's coming in. It was resolved that the day laid in the indictment is not material, and the jury are not bound to find him guilty that day, but may find the treason to be as it was in truth either before or after the time laid in the indictment; as it is resolved in Syer's case, Co. Pl. Coron. 230. And accordingly in this case the jury found Sir H. Vane guilty of the treason in the indictment the 30th of January, 1 Car. 2, which was from the very day the late king was murdered, and so all his forfeitures relate to that time to avoid all conveyances and settlements made by him.

REX *v.* NAPPER.

Crown Case Reserved. 1824.

[*Reported* 1 *Moo. Cr. C.* 44.]

The prisoner was tried and convicted before Mr. Justice Bayley, at the Summer Assizes for Lancaster in the year 1824, of stealing in a dwelling-house; but a doubt having occurred whether the situation of the house was sufficiently described in the indictment, the learned Judge submitted that point to the consideration of the Judges.

The indictment stated that the prisoner, on the 6th August, 5 Geo. 4, at Liverpool, in the county aforesaid, one coat, value forty shillings,

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[1] Part of the case, not involving the allegation of time, is omitted.

&c., of the goods and chattels of *Daniel Jackson*, in the dwelling-house of *William Thomas*, then and there being, then and there did feloniously steal, &c.

The doubt was, whether it should not have been stated "in the dwelling-house of *William Thomas*, there situate." Indictments for burglary and arson generally contain such a statement, and so do indictments for breaking a house in the daytime, or demolishing a house.

In Michaelmas Term 1824, the Judges met and considered this case, and held that the indictment showed sufficiently that the house was situate at Liverpool, and that the conviction was therefore proper.

STATE *v.* SEXTON.

SUPREME COURT OF NORTH CAROLINA. 1824.

[*Reported* 3 *Hawks*, 184.]

[illegible]

INDICTMENT for an assault with intent to kill, tried before PAXTON, J. The bill was found in March Term, 1824, and charged the offence to have been committed on the 19th day of August, 1824. The defendant was put upon his trial at the same Term in which the bill was found, and after the jury was impanelled, the prosecuting officer moved the court to amend the indictment as to the day on which the offence is charged to have been committed. The court overruled the motion, and the jury found the defendant guilty, in manner and form as charged in the bill of indictment, and judgment was arrested, because the offence was laid to have been committed on a day yet to come.

PER CURIAM. It is a familiar rule that the indictment should state that the defendant committed the offence on a specific day and year, but it is unnecessary to prove, in any case, the precise day or year, except where the time enters into the nature of the offence. But if the indictment lay the offence to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the Statutes of Jeofails, and cannot, therefore, be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the Grand Jury by whom the bill is found. These rules are too plain to require authority, and shew that the judgment of the court was right, and must be affirmed.

[illegible]

STATE *v.* SMITH.

DELAWARE. 185–.

[*Reported* 5 *Harr.* 490.]

THE defendant was indicted and convicted for disturbing a religious Society of Methodists in Mispillion hundred, assembled for the purpose of religious worship.

Mr. Comegys moved in arrest of judgment that the indictment was not sufficiently certain as to place. Religious meetings of the Methodists were held at other places in Mispillion hundred than at the private house where this meeting was held, and this indictment did not certainly inform the defendant *what* meeting he was charged with disturbing. (*Russ. Cr.* 837, *n.*)

THE COURT denied the motion, saying: The indictment is in the usual form, and is framed under the act of assembly. Even without an act of assembly, this would be an indictable offence, as the Christian religion is protected by the common law. Unless time or place enter into the crime itself, it is not material to state or prove it. The locality of a road enters into the charge of obstructing it. But as to disturbing a religious society, the place is unimportant, if within the county. It is not necessary that the place should be specifically laid to guard against another trial, for the identity of the two cases is to be tried by the jury, on a plea of former acquittal or conviction.

COMMONWEALTH *v.* TOLLIVER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1857.

[*Reported* 8 *Gray*, 386.]

INDICTMENT for an assault upon John Woods, at Boston. At the trial in the Municipal Court, ABBOTT, J., allowed the county attorney to introduce evidence to prove an assault upon Woods in Chelsea, notwithstanding the defendant's objection that this was a variance. The defendant, being convicted, alleged exceptions.

DEWEY, J. In criminal prosecutions of a character like the present, it is unnecessary to prove the place of committing the offence to be precisely in accordance with the allegation in the indictment. Place is immaterial, unless when it is matter of local description, if the offence be shown to have been committed within the county. All that is necessary to be shown is that the offence was committed at any place within the county. 2 Hawk. c. 25, § 84; 2 Russell on Crimes (7th Amer. ed.) 799; 1 Archb. Crim. Pl. (5th Amer. ed.) 99. It was no objection therefore to the competency of the evidence offered, that it tended to prove an assault committed in Chelsea, while the indictment alleged the same to have been committed at Boston, both places being within the county of Suffolk, and equally within the jurisdiction. This rule has been so long recognized and acted upon that the case presents no new or doubtful question to be solved. *Exceptions overruled.*

COMMONWEALTH *v.* TRAVERSE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865.

[*Reported* 11 *All.* 260.]

COMPLAINT dated April 3d, 1865, charging that the defendant "on the third day of April, in the year of our Lord eighteen hundred and sixty-five, at Newton, in the County of Middlesex, within six months last past," was a common seller of intoxicating liquors in violation of law.

At the trial in the Superior Court before Wilkinson, J., on appeal from the judgment of the magistrate, convicting the defendant, the district attorney offered no evidence of sales on the 3d of April, 1865, but relied upon evidence of sales made at several times within six months before that day. The defendant objected to this evidence, but it was admitted, and the defendant was found guilty, and alleged exceptions.

DEWEY, J. A well settled distinction has long prevailed as to the mode of alleging the time of the commission of an offence which consists of a single act, and that adopted in that class of cases where the alleged offence consists of a series of distinct acts. In the former, the precise day alleged is not material, and the evidence of such single act before or since the day alleged, if before the finding of the indictment and within the period permitted by the statute of limitations, is sufficient.

On the other hand, in the cases where the offence consists of a series of acts, the practice is to allege the same to have been committed on a certain day named, and on divers days and times between that day and some subsequent day named. The allegation that the acts were done between a certain day named and the day of the finding of the indictment has also been held sufficiently to designate the time of the commission of the offence. This form of stating the time, as allowed in this class of cases, gives to the prosecutor great latitude in the allegation of time, but, having fixed it by the indictment, the government is bound by it. And this has been held to be the rule where the acts constituting such offence are alleged to have been committed on a certain day named. The evidence must be confined to that day, and evidence of the commission of the offence before or after that day is incompetent. Commonwealth *v.* Elwell, 1 Gray, 462; Commonwealth *v.* Gardner, 7 Gray, 494; Commonwealth *v.* Sullivan, 5 Allen, 513.

The further inquiry is, whether this complaint has properly charged an offence on any other day than the third day of April. We are not disposed to favor any greater laxity in the form of the indictment in this class of cases than has been already sanctioned. Here the usual order of such allegation of the time is reversed. Instead of alleging the commission of the offence on a certain day, and on divers days and times subsequently between that day and a day named, the allegation is "within six months last past." We do not say that this charge would be fatally bad, had there been no other defect in stating the time. But there is no connecting word between the allegation of an offence committed on the third of April, and the further allegation, "within six months last past." It may be read as an averment that the third day of April was within six months last past. We think the only offence properly charged here is that of being a common seller of intoxicating liquors on April 3d, 1865. As already stated, the allegation as to time is a material one, and the government must prove the offence to have been committed on that day.

Exceptions sustained.

STATE *v.* JOHNSON.

SUPREME COURT OF TEXAS. 1869.

[*Reported* 32 *Texas*, 96.]

APPEAL from Smith. Tried below before the Hon. Samuel L. Earle.

The appellee was indicted for the theft of $160 in coin and $60 in currency, the property of B. H. Denson. The indictment was quashed on his motion, and the district attorney appealed on behalf of the State.

LINDSAY, J. The motion to quash the indictment in this case was properly sustained. There is no allegation in it, of either the time or of the place of the commission of the offence. The first is necessary, that it may appear from the charge it is not barred by the statute of limitations. The other is indispensable, that the court may know whether it has jurisdiction of the cause. For these defects it was rightfully quashed. The judgment is affirmed. *Affirmed.*

STATE *v.* BEATON.

SUPREME JUDICIAL COURT OF MAINE. 1887.

[*Reported* 79 *Maine*, 314.]

ON exceptions to the ruling of the court in overruling the defendant's demurrer to the complaint.

An appeal from the decision of a trial justice on a complaint and warrant for fishing for and catching lobsters in violation of law.

WALTON, J. Neither a complaint nor an indictment for a criminal offence is sufficient in law, unless it states the day, as well as the month and year, on which the supposed offence was committed. In this particular, the complaint in this case is fatally defective. It avers that "on sundry and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885," the defendant did the acts complained of. But it does not state any particular day on which any one of the acts named was committed. Such an averment of time is not sufficient. State *v.* Baker, 34 Maine, 52; State *v.* Hanson, 39 Maine, 337, and authorities there cited.

Exceptions sustained. Complaint quashed.

STATE *v.* DODGE.

SUPREME JUDICIAL COURT OF MAINE. 1889.

[*Reported* 81 *Maine*, 391.]

HASKELL, J.[1] "Neither a complaint nor an indictment for a criminal offence is sufficient in law, unless it states the day, as well as the month and year on which the supposed offence was committed." State *v.* Beaton, 79 Maine, 314.

An act, prohibited by statute on certain particular days only, must be charged as having been committed on one of those particular days; for the time laid is a material element in the offence, and, unless laid on a day within the statute, no offence would be charged. In the case at bar, both time and place are material elements to constitute the statute offence. State *v.* Turnbull, 78 Maine, 392.

The statute prohibits the maintaining of closed weirs in certain inland waters on Saturdays and Sundays between April 1st and July 15th. R. S., c. 40, § 43. The indictment charges the maintaining of the weir on June 1st, Tuesday, not close time, and on divers other days and times between that day and July 15th. All this may have been lawfully done. Saturday and Sunday are not pointed out as among the "divers other days and times." The defendants are presumed to have regarded law, not to have violated it.

True, the indictment avers that during Saturday and Sunday, June 12 and 13, the defendants were bound to carry and keep on shore the netting which closes that part of the weir where fish are usually taken, and that they did not do it. But if they did not maintain the weir on those days they had no need to do it. It is said that the last clause in the indictment sufficiently charges the offence. But the trouble with that clause is, that it assumes what is nowhere alleged, that the defendants during some Saturday or Sunday maintained the weir.

It is best for the proper administration of justice, that reasonable exactness and precision of statement be required from those officers of the law selected on account of their professional skill in this behalf.

Exceptions sustained.

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[1] The opinion only is given; it sufficiently states the case.

SECTION III. (*continued*).

(*c*) DESCRIPTION.

REGINA *v.* MANSFIELD.

NISI PRIUS. 1841.

[*Reported Car. & Marsh.* 140.]

THE prisoner was indicted for receiving "25 lbs. weight of tin," knowing the same to have been stolen. The indictment had been removed by certiorari, and came on to be tried at Nisi Prius. There were two other indictments against the same prisoner, the one for stealing iron, and the other for receiving brass, knowing it to have been stolen.

It appeared that the tin in question consisted of two pieces, which a witness called "lumps of tin;" but on cross-examination he admitted that they were called in the trade "ingots," but added that that term was applied as well to the pieces of tin as to the mould in which they were cast, and was applied to the shape. The tin in question had been cast into the pieces for the purpose of being again melted up for use in the prosecutor's manufactory, and in the middle of each was an indentation for the purpose of breaking them in two, when wanted to be melted up again.[1]

Upon the close of the case for the prosecution, *Ludlow*, *Serjt.*, for the prisoner, submitted that the tin was misdescribed. Instead of being laid as so many pounds' weight of tin, it ought to have been described as two ingots. Wherever an article has obtained a name in the trade which is applicable to it, it must be described by that name. From the case of Rex *v.* Stott, 2 Ea. P. C. 752, it would seem that it was erroneous to charge the prisoner with stealing so many pounds' weight of iron, where it appeared that the articles stolen were actually manufactured. It would be bad to describe a piece of cloth as so many pounds of wool. The object is to enable the prisoner to plead *autrefois acquit.*

Talfourd, *Serjt.*, and *Greaves.* Rex *v.* Stott is quite different from the present case; there the goods were actually made up into articles, which had specific names; here the article was still tin, and only put in the shape in which it was, for the purpose of being afterwards manufactured; it is in the course of manufacture, not manufactured. Although it would be bad to describe cloth as so many pounds of wool, still an end of a bale of cloth may well be described as so many yards of cloth; so a leg of mutton may be described as so many pounds' weight of mutton. As to the objection that the party could not plead *autrefois acquit*, it is the same question: for if the description is sufficient here, it would be sufficient if *autrefois acquit* were pleaded. It is idem per idem.

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[1] Part of the case, not relating to the question of pleading, is omitted.

Coleridge, J. It seems to me that the description is sufficient to answer all the purposes which are required by law. First, it is the subject of larceny equally, whether it be an ingot or so many pounds' weight of tin. Secondly, as to the facility of pleading *autrefois acquit*, the prisoner stands in the same situation, whether it be one or the other, because there must be some parol evidence in all cases to shew what it was that he was tried for before, and it would be as easy to prove one as the other. The last question is, whether it is described with sufficient certainty, in order that the jury may be satisfied that it is the thing described. If this had been some article that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed, as if a piece of cloth were called so many pounds of wool, because it has ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds' weight of iron.

The case went to the jury, who returned a verdict of —

Not guilty.

STATE *v.* NOBLE.

Supreme Judicial Court of Maine. 1839.

[illegible]

[*Reported* 15 *Maine*, 476.]

Exceptions from the Court of Common Pleas, Smith, J., presiding. Noble was indicted for fraudulently and wilfully taking from the Kennebec River and converting to his own use certain logs. He was found guilty on the first count only, thus describing the log: "One pine log marked H × W, of the value of three dollars, of the goods and chattels of J. D. Brown, Charles McIntire, and John Welch, and not the property of said Noble." The evidence applied entirely to a pine log marked "W × H × *with a girdle*," or circle cut round it. Brown testified that one of their logs, partly sawed into blocks, with the mark last mentioned was seen by him near Noble's house, "but that the log described in the first count of the indictment was not of their mark, and that he should not claim or know it as their property." Other objections were made, besides that arising from variation in the description in the indictment and the proof, which need not be stated, nor the facts on which they were founded. The Judge on this point instructed the jury that the mark by which the log was described in the first count might be rejected as surplusage, and if they found that the log which was seen near Noble's house was removed from the river and sawed by him, with the intention fraudulently and wilfully to convert it to his own use, and that the same log was the property of said Brown, Mc-

Intire, and Welch, then they would find Noble guilty on the first count. Noble excepted to this instruction.[1]

WESTON, C. J. It may be regarded as a general rule, both in criminal prosecutions and in civil actions, that an unnecessary averment may be rejected, where enough remains to show that an offence has been committed, or that a cause of action exists. In Ricketts *v.* Solway, 2 Barn. & Ald. 360, ABBOTT, C. J., says, "There is one exception however to this rule, which is, where the allegation contains matter of description. Then if the proof given be different from the statement, the variance is fatal." As an illustration of this exception, Starkie puts the case of a man charged with stealing a black horse. The allegation of color is unnecessary, yet as it is descriptive of that which is the subject matter of the charge, it cannot be rejected as surplusage, and the man convicted of stealing a white horse. The color is not essential to the offence of larceny, but it is made material to fix the identity of that which the accused is charged with stealing. 3 Stark. 1531.

In the case before us the subject matter is a pine log, marked in a particular manner described. The marks determine the identity; and are therefore matter purely of description. It would not be easy to adduce a stronger case of this character. It might have been sufficient to have stated that the defendant took a log merely, in the words of the statute. But under the charge of taking a pine log, we are quite clear that the defendant could not be convicted of taking an oak or a birch log. The offence would be the same; but the charge to which the party was called to answer, and which it was incumbent on him to meet, is for taking a log of an entirely different description. The kind of timber, and the artificial marks by which it was distinguished, are descriptive parts of the subject matter of the charge, which cannot be disregarded, although they may have been unnecessarily introduced. The log proved to have been taken was a different one from that charged in the indictment; and the defendant could be legally called upon to answer only for taking the log there described. In our judgment, therefore, the jury were erroneously instructed that the marks might be rejected as surplusage; and the exceptions are accordingly sustained.

HASKINS *v.* THE PEOPLE.

COURT OF APPEALS OF NEW YORK. 1857.

[*Reported* 16 *N. Y.* 344.]

WRIT of error to review a judgment of the Supreme Court, affirming, on error to that court, a judgment of the Oyer and Terminer of Onondaga County.

The prisoner was indicted, with four other persons, for grand larceny, the property alleged to have been stolen being money and bank notes, the property of David J. Shaw. It was described in the indictment as "two promissory notes for the payment of money, commonly called bank notes, of the Stonington Bank, current money of the State of New York, each of the value of fifty dollars; bank bills of banks to the jurors unknown, and of a number and denomination to the jurors unknown, of the value of six hundred dollars; silver coin, current money of the State of New York, of a denomination to the jurors unknown, of the value of fifty dollars; gold coin, current money of the State of New York, of a denomination to the jurors unknown, of the value of fifty dollars."

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[1] Arguments of counsel are omitted.

The plaintiff in error was tried separately in the Oyer and Terminer, in June, 1857. Shaw, the owner of the money alleged to have been stolen, resided at Summer Hill, Cayuga county. His iron safe, which was kept in a wing in his house, remote from the apartment in which he slept, was forced open during the night of the 27th of October, 1855, and the contents, about $600 in money and some papers, were taken away. Shaw swore that there were among the money at least two fifty-dollar bills of the Stonington Bank; that the residue of the money was in current bank bills, and gold and some silver coins. Upon the examination of Shaw he was asked by the prosecution to state the amount and kind of bills and of gold and silver coin. The prisoner's counsel objected to the inquiry on account of the generality of the description in the indictment. The objection was overruled and the prisoner's counsel excepted. The witness described the different kinds of money as well as he was able.[1]

Denio, C. J. The indictment was sufficient. When the substance of the offence is set out, the jurors may omit a matter of description which they cannot ascertain. The People *v.* Taylor, 3 Denio, 91, and cases cited. If this were not so there would often be a failure of justice. In the case of the stealing of a considerable parcel of bank notes or a quantity of coin, it would frequently, and perhaps generally, happen that the owner would not be able to specify the different kinds of notes or the various species of coin. The description of them as bank notes, and as gold or silver coin, together with a statement of the ownership, with an averment that a more particular description cannot be given, sufficiently identifies the offence to guard the prisoner against the danger of another prosecution for the same crime. But this indictment would be sufficient without any aid from this rule. Two of the notes which the defendant stole, which were of an amount sufficient to constitute grand larceny, were described with particularity; and if it should be granted that the other bills and the coin were not sufficiently described, still they could be spoken of in the testimony among the circumstances attending the offence, though the conviction could only be had as to the property of which there was a sufficient description. The exception upon this point was not well taken.

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[1] Part of the case, not relating to the question of pleading, is omitted.

COMMONWEALTH *v.* STONE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[*Reported* 152 *Mass.* 498.]

INDICTMENT alleging that the defendant, at a hearing in the Probate Court holden at Worcester in the county of Worcester in this Commonwealth, procured "Laura A. Fairbanks of Worcester in said county of Worcester" to commit perjury. At the trial in the Superior Court, before ALDRICH, J., one Laura A. Fairbanks, who was admitted to be the person described in the indictment as of Worcester in this Commonwealth, testified, without contradiction, that at the time she testified in the Probate Court her residence was in Brookline in the State of New Hampshire, and has been there since. The judge declined to rule, as requested by the defendant, that "there is a variance between the evidence and the allegations of the indictment in this, that the indictment alleges perjury by Laura A. Fairbanks of Worcester, in the county of Worcester in the Commonwealth of Massachusetts, and the evidence tends to prove perjury only by Laura A. Fairbanks, of Brookline, New Hampshire."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

DEVENS, J. The gist of the charge in the indictment is, that the defendant procured Laura A. Fairbanks to commit perjury in the trial therein described. The Laura A. Fairbanks who testified in the Superior Court, it was admitted, was the same person who had testified in the Probate Court where the perjury was alleged to have been committed, nor did it appear whether there was any person of the same name who was a resident of Worcester. The indictment described the Laura A. Fairbanks whom the defendant was charged with suborning as "of Worcester in said county of Worcester" in this Commonwealth. This was an allegation that she was a resident of Worcester, and the uncontradicted evidence was that the person who had testified in the Probate Court, and also in the Superior Court, was at the time and since a resident of New Hampshire.

It has been held that where a person necessarily mentioned in an indictment is erroneously described as George E. Allen instead of George Allen, or Nathan S. Hoard instead of Nathan Hoard, or the Boston and Worcester Railroad Company instead of the Boston and Worcester Railroad Corporation, the variance is fatal, unless it shall be shown that the person so named is known by the one name as well as the other, as the correct description of such person is necessary to identify the offence. Commonwealth *v.* Shearman, 11 Cush. 546; Commonwealth *v.* Pope, 12 Cush. 272; Commonwealth *v.* McAvoy, 16 Gray, 235. Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, the circumstances of the description are to be proved, as they are made essential to its identity. Thus, in an indictment for stealing a horse, its color need not be mentioned; but if it is stated, it is made descriptive of the animal, and a variance in the proof of its color is fatal. 1 Greenl. Ev. § 65; 3 Stark. Ev. (4th Am. ed.) 1530; Commonwealth *v.* Wellington, 7 Allen, 299; State *v.* Noble, 15 Maine, 476; Rex *v.* Craven, Russ. & Ry. 14.

Where circumstances are not descriptive of the crime, a discrepancy between them as alleged and as proved is not important, but in the case at bar the description of the person whom the defendant was charged with suborning was essential to this identity. While it was not necessary to have described this person by her residence, when this allegation was introduced it was to be proved, as it was this person whom the defendant was charged with suborning. In an action for malicious prosecution of the plaintiff upon a charge of felony, before Baron Waterpark of Waterfork, a magistrate of the kingdom of Ireland, it was held that proof of a prosecution before Baron Waterpark of Waterpark was a fatal variance. Walters *v.* Mace, 2 B. & Ald. 756. If, therefore, Fairbanks was not a resident of Worcester, but of New Hampshire, the defendant was entitled to a ruling that there was a variance between the allegation of the indictment and the proof.

The Pub. Sts. c. 213, § 16, provide that certain defects of form, as by reason of the omission or misstatement of the degree, occupation, &c., of the defendant, or of his place of residence, shall not vitiate the indictment, but it has made no such provision in regard to others necessarily mentioned therein. In general, it may be said that a misnomer, or other misdescription of a defendant, has always been deemed of less importance than that of one necessarily mentioned in the description of the offence, as the defendant may plead in abatement if he deems the matter of sufficient importance. The Pub. Sts. c. 205, §§ 5, 6, also, which prescribe or rather modify the common law form of the indictment for perjury, and subornation of perjury, do not suggest that there is to be any further latitude in the description of the person whose testimony has been alleged to be suborned than that which has heretofore been permitted. *Exceptions sustained.*

SECTION IV.

Counts.

CASTRO, *alias* ORTON, *alias* TICHBORNE *v.* THE QUEEN.

House of Lords. 1881.

[*Reported* 6 *App. Cas.* 229.]

This was an appeal against a decision of the Court of Appeal, which had affirmed a judgment of the Queen's Bench Division. Law Rep. 9 Q. B. 350; 5 Q. B. D. 490.

On the 8th of April, 1872, the grand jury at the Central Criminal Court found a true bill against Thomas Castro, *alias* Arthur Orton, *alias* Sir R. C. D. Tichborne, Bart, for perjury. The indictment contained two counts. The first count charged that on the 10th of May, 1871, at Westminster, before Sir W. Bovill, Lord Chief Justice of the Common Pleas, an issue, duly joined in an action of ejectment, came on to be tried, in which the appellant was the claimant, and Franklin Lushington and others were defendants, that the appellant appeared as a witness for himself and was duly sworn, and gave answers in several matters (which were particularly set forth), and that the appellant on his oath falsely answered in these matters, and so committed the offence of perjury against the peace of our lady the Queen, her crown and dignity.

The second count charged that, on the 7th of April, 1868, a suit had been instituted in Chancery, in which the appellant was the plaintiff, and the Hon. Teresa Tichborne, widow, and others were the defendants, praying that in case it might be deemed requisite for him to take proceedings at law for the recovery of the Tichborne estates, the defendants might be restrained by injunction from setting up certain outstanding terms, &c., therein mentioned, and that on the said 7th of April, 1868, the defendant made an affidavit in support of his motion in the said suit, and therein made certain false statements (which were fully set forth in the count), and did thereby commit perjury against the peace, &c., as before.

The appellant pleaded not guilty. The indictment was removed into the Queen's Bench. The trial, which began on the 23d of April, 1873, and terminated on the 28th of February, 1874, took place before Lord Chief Justice Cockburn. The verdict was in the following form: "The jurors so empannelled, &c., on their oath say that the said Thomas Castro, otherwise called, &c., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified, in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." The judgment that followed was, "That the said Thomas Castro, otherwise, &c., for the offence charged in and by the first count of the said indictment, be kept in penal servitude for the term of seven years now next ensuing. And that for and in respect of the offence charged in and by the second count of the said indictment, he, the said Thomas Castro, otherwise, &c., be kept in penal servitude for the farther term of seven years to commence immediately upon the expiration of his said term of penal servitude for his offence in the first count of the said indictment."

On the 13th of December, 1879, Sir John Holker, Her Majesty's then Attorney-General, granted his fiat for a writ of error, which was afterwards issued, and the case was argued in the Court of Appeal, when judgment was given for the Crown. 5 Q. B. D. 490. This appeal was then brought.

Lord Blackburn.[1] My Lords, notwithstanding the very considerable time which has been occupied in the argument, I have never been able from the beginning to the end to entertain the least doubt that in this case the judgment ought to be affirmed.

I must say at once I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar. I totally disagree that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking of course of the time before the Judicature Acts passed which swept them all away. Many enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at common law were exactly the same in each case. The course taken with regard to an indictment was this: The Queen having sent her commission to the grand jury, or any other commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that, process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

Now, at common law there was no objection whatever, in point of law, to bringing a man who was charged with several offences, if those charges were all felonies, or were all misdemeanors, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and in misdemeanor, and therefore felony and misdemeanor could not be tried together; but any number of felonies and any number of misdemeanors might.[2] The contrary was asserted by the learned counsel, but, though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made to the discretion of the presiding judge to say, "Try me only for one offence, or, try me only for two offences; if one was the real thing let me be tried for one and one only," and wherever it was right that that should be done the judge would permit it. For these mixed motives it was well established by a long series of decisions (I confess I doubt whether they were right at first, but certainly they have been both well established now and sanctioned by statute — that is quite clear) that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily, I may say, unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election and send them to two trials. It never was decided, even in felony, that, if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time, in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanor it was by no means a matter of course that that should be done. I think that if the judge, upon an application made to him, had been satisfied that to try the man for several misdemeanors together would work injustice to the prisoner, he had a perfect right to say, "I will not work this injustice by trying them together, let us diminish them in number and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanor, but I feel very little doubt that it may have been.

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[1] The concurring opinions of the Lord Chancellor and Lord Watson, and part of Lord Blackburn's opinion, are omitted.

[2] "It was a principle of the English law, and the rule has been adopted in some of our States, that there can be no conviction for a misdemeanor upon an indictment for a felony, even where the allegations of the indictment include such misdemeanor. The reason for the rule was, that persons charged with misdemeanors had certain advantages at their trials which were not allowed to those arraigned for felony, and it was deemed unjust to suffer the too heavy allegation to take from them these privileges. But the practice of withholding any substantial privilege from a person indicted for felony, which is allowed to one indicted for misdemeanor, does not obtain in this country, and therefore, in many of the States it is the practice to permit convictions for misdemeanor on indictments for felony, where the latter includes the former. 1 Bishop on Crim. Law (5th ed.) secs. 804, 805. . . . In the late case of State *v.* Stewart *et al.*, 59 Vt. 273, it is said: 'Although authorities can be found that lay down the rule that felonies and misdemeanors, or different felonies, can not be joined in the same indictment, still the rule in this and most of the States is otherwise. It is always and

I think that in such a case as the American case, Tweed *v.* Liscomb, 15 Sickel's New York Ap. Cas. 559, which was cited, where a man was called upon to answer before one jury at one time for two

everywhere permissible for the pleader to set forth the offence he seeks to prosecute, in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offences of different grades, the court has it in its power to preserve all rights of defence intact.' See also Sterick *v.* Commonwealth, 78 Pa. St. 460; Hunter *v.* Commonwealth, 79 id. 503; Hutchinson *v.* Commonwealth, 82 id. 472; Hawker *v.* The People, 75 N. Y. 487; Crosby *v.* Commonwealth, 11 Metc. 575; State *v.* Hood, 51 Me. 363; Commonwealth *v.* McLaughlin, 12 Cush. 612; State *v.* Lincoln, 49 N. H. 464." BAKER, J., in Herman *v.* The People, 131 Ill. 594, 598. — ED.

hundred offences, the man might not unreasonably have said, "That is too much to put a man upon his trial for; select five or six, try me on those, let the rest stand over." I do not see that that would be at all an unreasonable application. And in the present case, if an application had been made to the Court of Queen's Bench to put the party to his election, and if it had been said "I cannot be fairly tried for one offence of perjury committed in Middlesex, if at the same time I am to be tried for another perjury committed in London, therefore there must be two separate trials;" if such an application had been made the judges of the Queen's Bench would doubtless have said, We will listen to the arguments that may be urged in its favor. What they could possibly have been I do not know, but no such application was made. The prisoner was tried upon the two counts before one petty jury. They were taken both together, and then the result was that he was found guilty upon both.

Something was attempted to be argued upon the wording here, namely, that he was found "guilty of the premises" in both counts, to the effect that that did not mean the premises charged in each of the counts, but meant only (if I understand the argument rightly) such premises as were charged not only in the one but also in the other. In the first place, that is not the meaning of the words; and, secondly, it would be utterly absurd, because the one count related to things which happened in Middlesex, and the other related entirely to things which happened in London three years before; therefore there could be nothing identical in the two.

But he was found guilty, and then came the question what was to be the sentence. It is clear that if the court had pleased to grant an application these two counts might have been tried, the one in London before a London jury, and the other in Middlesex before a Middlesex jury; but for the act relating to the Central Criminal Court, which gives that court jurisdiction over both London and Middlesex, they must have been so tried. But even now they might have been so tried, and if they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, Rex *v.* Wilkes, 4 Burr. 2527; 19 How. St. Tr. 1075; 4 Bro. P. C. 360, would have been absolutely in point as to the sentence. There would not have been a pretext for saying there was the least difference.

But then it is put in the argument in this way, that when they are both tried before one jury, and when the prosecutor has not been put to his election, but the trial for both offences has taken place together, the consequence must be that the prisoner is not to be punished in the same way as he would have been if he had been tried for each before two separate judges, and he is therefore entitled to get off with less punishment. Why? I am sure I cannot conceive, nor can I see that any authority has been cited for that, at any rate in the English law, nor does it proceed on any reason. In regard to the American case, The People *ex rel.* Tweed *v.* Liscomb, 15 Sickel's New York Ap. Cas.

559, which was cited, it might be enough to say that I observe that the American case proceeds upon the express ground that the court was acting upon New York decisions, subsequent to the Declaration of Independence, and upon New York statutes, and not upon English rules or English law. I dare say that decision may be right according to those New York decisions and statutes, but the decision does not apply here. They say that according to their view of the New York statutes and the New York decisions, where there is but one trial before one jury, it must be for one offence, and for one offence only, and upon that they all rest. They, logically enough, say, if that is granted where there are sentences passed for more than one offence, all but one must be *ultra vires;* accordingly they held that the power of passing a sentence was exhausted by the first sentence. I leave it to the American judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English law. I think the English decisions are all the other way, and the reason of the case is, to my mind, quite clearly the other way.

Now I will mention but one or two cases which prove it. I will not quote them at length. The first is Young *v.* The King, 3 T. R. 98, where the law is laid down in the way I have stated, that it is not a matter of right and law that they shall not be tried together, but only a matter of election. Then comes Rex *v.* Jones, 2 Camp. 131, where Lord Ellenborough both laid down the law as I have stated it, and acted upon it. Then Rex *v.* Kingston, 8 East, 41, where Lord Ellenborough again repeats the doctrine; and lastly, Rex *v.* Robinson, 1 Moo. C. C. 413, which has been already cited, where it was said that the doctrine of Rex *v.* Wilkes, 4 Burr. 2527; 19 How. St. Tr. 1075; 4 Bro. P. C. 360, ought to have been applied to a case where there were two misdemeanors in separate counts tried together before one jury. My Lords, taking all those cases together, I myself can feel no doubt at all that, by the English law, and going by that alone, there is not a pretence for this writ of error.

Judgment appealed from affirmed, and appeal dismissed.[1]

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[1] "I have examined with some care the cases in the courts of this State and of England to which we have been referred, or which have come under my observation, and I find no authority for holding that the common law, as it existed in England in April, 1775, or as it exists and is administered in this State at this time, permits cumulative sentences to be imposed upon conviction for several distinct misdemeanors, charged in different counts in a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of punishment for a single misdemeanor. I do not regret this. A proper administration of the criminal law, as well in the public interest as for the protection of those accused of crime, requires a different rule. The power of the court was exhausted by one sentence to imprisonment for one year, and the payment of a fine of $250; or if several judgments can be pronounced by a sentence, the same in the aggregate, distributing such punishment and apportioning it to the convictions upon the several counts, according to the demerits of the offences charged in each; each and every of the judgments and sentences, in excess of that limit, was *coram non judice.* A judgment in the form and to the

COMMONWEALTH *v.* TUCK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[*Reported* 20 *Pick.* 356.]

MORTON, J.,[1] delivered the opinion of the court. Several objections have been made against the indictment and urged with ingenuity and force. Although they may be inconsistent with each other, yet their inconsistency is no fatal infirmity, and if either of them is well founded and incurable, it must prevail. Some of them deserve serious consideration.

The first objection is duplicity. It is argued that the indictment in one count charges two distinct substantive offences, shop-breaking and larceny. This objection assumes that both crimes are well charged. Two questions arise upon this point: is the indictment double? and if so, is the objection seasonably taken?

The general rule, unquestionably, is that two or more crimes cannot be joined in the same count of an indictment. Archb. Crim. Pl. 25. This rule, which is not only convenient in practice, but essential to the rights of the accused and important to the due administration of criminal law, should not be disregarded. But it has exceptions. Where two crimes are of the same nature and necessarily so connected that they *may*, and when both are committed *must* constitute but one legal offence, they should be included in one charge. Familiar examples of these are, assault and battery, and burglary. An indictment for the latter is similar to the one before us. 1 Stark. Crim. Pl. (2d ed.) 39. An assault and battery is really but one crime. The latter includes the former. A person may be convicted of the former and acquitted of the latter, but not *vice versa*. They must therefore be charged as one offence. Bul. N. P. 15. So in burglary, where the indictment charges a breaking and entry with an intent to steal and an actual stealing (which is the common form), the jury may acquit of the burglary and convict of the larceny, but cannot convict of the burglary and larceny as two distinct offences. The latter is merged in the former, and they constitute but one offence. Rex *v.* Withal, 1 Leach, 102.

It is difficult to distinguish the case at bar from burglary. An in-

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extent allowed by law once pronounced, the power of the court became *functus officio* in respect to that prosecution and the indictment, except to see that the judgment was executed. There was no longer any record of verdict upon which the court could act. The jurisdiction over the person of the condemned was exhausted, and as if no prosecution had ever been instituted against him. The purposes of the prosecution and of the indictment had been accomplished if the punishment for the offence is fixed by statute, a judgment in excess of the statutory limit is void for the excess, as we have seen by adjudged cases." — ALLEN, J., in People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 590.

[1] The opinion alone is given, and part of it, not relating to the question of pleading, is omitted.

dictment setting forth that the defendant broke and entered the shop with intent to steal, would be good. Can the addition of the fact that he did steal, which is the best evidence of his intention, vitiate the indictment? We cannot perceive that it does. It is true the main charge might be established without proof of the larceny, and the larceny might be established without proof of the breaking and entry; but wherein does this differ from burglary? The principles governing both seem to be the same.

But even if duplicity existed in this indictment, it may well be doubted whether the objection does not come too late. In civil actions duplicity is cured by general demurrer or by pleading over. Archb. Pl. and Ev. 96. And in criminal cases it is extremely doubtful whether it can be taken advantage of in arrest or error. Archb. Crim. Pl. 21. See Commonwealth *v.* Eaton, 15 Pick. 273. Indeed, we think the better opinion is, that it cannot.

It is true that the statute of jeofails does not extend to criminal prosecutions. A defective indictment cannot be cured by verdict. If the crime be not correctly described, no judgment can be rendered either upon verdict or plea of guilty. 2 Hale's P. C. 193; Commonwealth *v.* Morse, 2 Mass. R. 130; Commonwealth *v.* Hearsey, 1 Mass. R. 137.

But the objection now under consideration is totally different. It is not that the offence is defectively set forth, but that more than one offence is sufficiently set forth in the same indictment. The only argument which lies against the latter is, that it subjects the defendant to inconvenience and danger by requiring him to prepare himself to meet several charges at the same time. The appropriate remedy would be a motion to the court to quash the indictment, or to confine the prosecutor to some one of the charges. Archb. Crim. Pl. 3.

COMMONWEALTH *v.* FITCHBURG RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[*Reported* 120 *Mass.* 372.]

LORD, J.[1] The indictment in this case contained five counts, and as appears by the bill of exceptions, all for the same offence although it is not alleged, as sometimes it is, that the various counts are different modes of charging the same offence. It has long been the practice in this Commonwealth to charge several misdemeanors in different counts of the same indictment, and to enter verdicts and judgments upon the several counts, in the same manner and with the same effect as if a separate indictment had been returned upon each charge. It has also been long established that the same offence may be charged, as committed by different means or in different modes, in various distinct counts of an indictment, and that a general verdict of guilty upon such indictment and judgment thereon is a conviction of but a single offence, and is deemed to be upon that count of the indictment to which the evidence is applicable.

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[1] The opinion alone is given, and part of it, not relating to the question of pleading, is omitted.

The first count charges generally a killing of the person named therein within the city of Somerville, by reason of the gross negligence of the servants of the defendant in the management of a locomotive engine then in charge of said servants.

The second count charges the killing to have been by collision at the crossing at grade of a highway in Somerville, by reason of the same negligence.

The third count charges that the death was caused, either by the defendant's own neglect or the neglect of its servants, by collision at the crossing at grade of a town way in Somerville, and that it was by reason of neglect of the servants and agents in charge to ring the bell or sound the whistle upon approaching said crossing as required by law.

It is not necessary to refer to the other counts, as there was a verdict of not guilty upon them.

The jury returned a verdict of guilty upon each of the first three counts. The court are all of opinion that this must be deemed to have been a mistrial. But one offence was charged, and the jury should have been instructed to return a general verdict of guilty or not guilty upon the whole indictment as for a single offence, which would have been in conformity with the long and well established practice in this Commonwealth; or they should have been instructed to return a verdict of guilty upon the count proved, if either was proved, and not guilty upon all the others. As the record now stands, the defendant corporation was charged with five distinct misdemeanors, of three of which it was found guilty, and of two of which it was found not guilty. The bill of exceptions, however, shows that but one offence was committed, and it is suggested that a *nolle prosequi* may be entered as to two of the counts, and judgment upon the other. It is obvious that inasmuch as the several counts may be supported by different evidence, and as they are, at least to some extent, inconsistent with each other, it is impossible to determine which was proved, it being certain that all could not have been. The verdict must therefore be set aside.

CLAASEN *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1891.

[*Reported* 142 *U. S.* 140.]

GRAY, J.[1] There can be no doubt of the sufficiency of the first count on which the defendant was convicted. It avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds (fully described), the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged. United States *v.* Britton, 107 U. S. 655, 669; The King *v.* Johnson, 3 M. & S. 539, 549; Starkie Crim. Pl. (2d ed.) 454; 3 Chitty Crim. Law, 981; 2 Bishop Crim. Pro. §§ 315, 322.

This count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered.

In criminal cases the general rule, as stated by Lord Mansfield before the Declaration of Independence, is "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." Peake *v.* Oldham, Cowper, 275, 276; Rex *v.* Benfield, 2 Bur. 980, 985. See also Grant *v.* Astle, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. Locke *v.* United States, 7 Cranch, 339, 344; Clifton *v.* United States, 4 How. 242, 250; Snyder *v.* United States, 112 U. S. 216; Bond *v.* Dustin, 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771.

The opposing decision of the House of Lords, in 1844, in the well known case of O'Connell *v.* The Queen, was carried, as appears by the report in 11 Cl. & Fin. 155, by the votes of Lord Denman, Lord Cottenham and Lord Campbell against the votes of Lord Lyndhurst and Lord Brougham, as well as against the opinions of a large majority of the judges consulted, and the universal understanding and practice of the courts and the profession in England before that decision. It has seldom, if ever, been followed in the United States.

In Commonwealth *v.* Boston & Maine Railroad, 133 Mass. 383, 392, and in Wood *v.* State, 59 N. Y. 117, 122, relied on by the plaintiff in error, the general rule was not impugned, and judgment upon a general verdict was reversed because of erroneous instructions, duly excepted to by the defendant at the trial, expressly authorizing the jury to convict upon an insufficient count.

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[1] The opinion only is given; it states the case. Part of the opinion, not relating to the question of pleading, is omitted.

In the case now before us, the record does not show that any instructions at the trial were excepted to, and the jury did not return a general verdict against the defendant on all the counts, but found him guilty of the offences charged in each of the five counts now in question. This being the case, and the sentence being to imprisonment for not less than five years nor more than ten, which was the only sentence authorized for a single offence under the statute on which the defendant was indicted, there is no reason why that sentence should not be applied to any one of the counts which was good.

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SECTION V.

Statutory Simplifications of Criminal Pleading.

NEW YORK CODE OF CRIMINAL PROCEDURE.

§ 284. The indictment is sufficient, if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;

2. That it was found by a grand jury of the county, or if in a city court, of the city in which the court was held;

3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that it has been found impossible to discover his real name;

4. That the crime was committed at some place within the jurisdiction of the court, except where . . . the act, though done without the local jurisdiction of the county, is triable therein;

5. That the crime was committed at some time prior to the finding of the indictment;

6. That the act or omission charged as the crime is plainly and concisely set forth;

7. That the act or omission charged as the crime is stated with such a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case.

§ 293. Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person, or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defence on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable.

MASSACHUSETTS CRIMINAL PLEADING ACT OF 1899.

[*Mass. Revised Laws, chap.* 218.]

Sec. 18. The circumstances of the act may be stated according to their legal effect, without a full description thereof.

Sec. 19. If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name mentioned in the indictment.

Sec. 20. The time and place of the commission of the crime need not be alleged unless it is an essential element of the crime. The allegation of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations. The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court. All allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place.

Sec. 21. The means by which a crime is committed need not be alleged in the indictment unless they are an essential element of the crime.

Sec. 22. If an allegation relative to a written instrument which consists wholly or in part of writing, print or figures is necessary, it may describe such an instrument by any name or designation by which it is usually known, or by the purport thereof, without setting out a copy or facsimile of the whole or of any part thereof; and no variance between such recital or description and the instrument produced at the trial shall be material, if the identity of the instrument is evident and the purport thereof is sufficiently described to prevent prejudice to the defendant.

Sec. 23. If an allegation relative to any bullion, money, notes, bank notes, checks, drafts, bills of exchange, obligations or other securities for money of any country, state, county, city, town, bank, corporation, partnership or person is necessary, it may describe it as money, without specifying any particulars thereof; and such descriptive allegation shall be sustained by proof of any amount of bullion, money, notes or other securities for money as aforesaid, although the particular nature thereof shall not be proved.

Sec. 24. The value or price of property need not be stated, unless it is an essential element of the crime. If the nature, degree or punishment of a crime depends upon the fact that the property exceeds or does not exceed a certain value, it may be described, as the case may be, of more than that value, or of not more than that value.

Sec. 25. If an indictment for a crime which involves the commission or attempted commission of an injury to property describes the property with sufficient certainty in other respects to identify the act, it need not allege the name of the owner.

Sec. 27. In an indictment for the larceny of an animal, or for any other crime in respect thereof, it may be described by the name by which it is commonly known, without stating its age or sex or whether it is alive or dead.

Sec. 29. An allegation that the defendant committed the act charged shall be a sufficient allegation that he was responsible therefor.

Sec. 30. If an intent to injure or defraud is an essential element of a crime, an intent to injure or defraud may be alleged generally, without naming the person, corporation or government intended to be injured or defrauded. Proof of an intent to injure or defraud any person or body corporate shall be competent to support the allegation.

Sec. 31. Different means or different intents by or with which a crime may be committed may be alleged in the same count in the alternative.

Sec. 33. Presumptions and conclusions of law, matters of which judicial notice is taken and allegations which are not required to be proved need not be alleged. An indictment shall not be considered defective or insufficient because it omits to allege that the crime was committed, or the act was done, "traitorously," "feloniously," "burglariously," "wilfully," "maliciously," "negligently," "unlawfully," or otherwise similarly to describe the crime, unless such description is an element of the crime charged, or because it omits to allege that the crime was committed or done with "force and arms," or "against the peace," or against the form of the statute or statutes, or against a by-law, ordinance, order, rule or regulation of any public authority, nor because it omits to state or misstates the title, occupation, estate or degree of the defendant or of any other person named in the indictment, or of the name of the county, city, town or place of his residence, unless such omission or misstatement tends to the prejudice of the defendant. An indictment shall not be considered defective or insufficient by reason of describing a fine or forfeiture as enuring to the use of the commonwealth instead of to the use of the county, city or town, nor by reason of any misstatement as to the appropriation of any fine or forfeiture, nor by reason of its failure to allege or recite a special statute or a by-law or ordinance of a city or town or order of the mayor and aldermen or selectmen or rules or regulations of any public board of officers.

Sec. 34. An indictment shall not be quashed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defence; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars as provided in section thirty-nine.

Sec. 35. A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defence. He shall not be acquitted by reason of immaterial misnomer of a third party, by reason of an immaterial mistake in the description of property or the ownership thereof, by reason of failure to prove unnecessary allegations in the description of the crime or by reason of any other immaterial mistake in the indictment.

Sec. 37. An excuse, exception or proviso which is not stated in the enacting clause of a statute creating a crime or which is stated only by reference to other provisions of the statute need not be negatived in the indictment unless it is necessary for a complete definition of the crime. If any statute shall prescribe a form of indictment in which an excuse, exception or proviso is not negatived, it shall be taken that it is not necessary to a complete definition of the crime that they should be negatived. If a statute which creates a crime permits an act, which is therein declared to be criminal, to be performed without criminality under stated conditions, such conditions need not be negatived.

Sec. 38. The words used in an indictment may, except as otherwise provided in this section, be construed according to their usual acceptation in common language; but if certain words and phrases are defined by law, they shall be used according to their legal meaning.

The following words, when used in an indictment, shall be sufficient to convey the meaning herein attached to them, —

Adultery. — The sexual intercourse by a married man with a woman not his wife, by an unmarried man with a married woman, by a married woman with a man not her husband.

Affray. — The fighting together of two or more persons in a public place to the terror of the persons lawfully there.

False Pretences. — The false representations made by word or act which are of such a character, or which are made under such circumstances and in such a way, with the intention of influencing the action of another, as to be punishable.

Forgery. — The false making, altering, forging or counterfeiting of any instrument described in section one of chapter two hundred and nine, or any instrument which, if genuine, would be a foundation for or release of liability of the apparent maker.

Fornication. — The sexual intercourse between a man and an unmarried woman.

Murder. — The killing of a human being with malice aforethought.

Rape. — The unlawful forcible carnal knowledge by a man of a woman against her will or without her consent; or the carnal knowledge by a man of a female child under the statutory age of consent.

Robbery. — The taking and carrying away of personal property of another from his person and against his will, by force and violence, or by assault and putting in fear, with intent to steal.

Stealing. — *Larceny.* — The criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretences.

Sec. 39. The court may, upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, in order to prepare for his defence, the defendant desires information as to the time and place of the alleged crime or as to the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid.

Sec. 40. In an indictment for criminal dealing with personal property with intent to steal, an allegation that the defendant stole said property shall be sufficient; and such indictment may be supported by proof that the defendant committed larceny of the property or embezzled it, or obtained it by false pretences.

PEOPLE *v.* OLMSTEAD.

SUPREME COURT OF MICHIGAN. 1874.

[*Reported* 30 *Mich.* 431.]

CAMPBELL, J.[1] The respondent was informed against for manslaughter in killing one Mary Bowers, whom it is averred he did "feloniously, wilfully and wickedly kill and slay, contrary to the statute in such case made and provided," etc. The information does not name the offence, nor the manner or means of its commission.

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[1] Only so much of the opinion as deals with the validity of the indictment is given. — ED.

Upon the trial the prosecution, in opening, stated that the prisoner was charged under § *7542 of the Compiled Laws*, which is as follows.

"Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

The preceding section makes the malicious killing of an unborn quick child manslaughter, if done by an injury to the mother which would have constituted her murder if she had died.

The succeeding section makes all unnecessary attempts to produce the miscarriage of a pregnant woman, whatever may be the result, punishable as a misdemeanor.

The distinction, therefore, is clearly taken, as depending on the intent to destroy a living unborn child, and supplies a defect at the common law, whereby such attempts were not felonious, and in some cases, at least, may not have been punishable at all.

The elements of the crime, as applied to the case before us, are found in the death of the mother, produced by acts intended to destroy a quick child; that term being used in the statute as an unborn child liable to be killed by violence. The ambiguity which, according to Mr. Bishop, seems to exist in some statutes, as to the fœtal condition, is not found in our statutes, which cover the whole ground by different provisions. Comp. L., §§ 7541, 7542, 7543; Bishop on Statutory Crimes, §§ 742–750, and cases. . . .

Objection was made that the information was not properly framed to support the conviction.

The information is very brief, and consists of the single statement that respondent, on a day and year and at a place named, "one Mary A. Bowers feloniously, wilfully and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Michigan."

It is not claimed by any one that this would have been a good indictment at common law, not only for formal defects, but also for not indicating in any way the means or manner of causing death. But it is justified under our statute, which dispenses with allegations of these, and declares it sufficient "to charge that the defendant did kill and slay the deceased." *C. L.*, § *7916*.

Respondent claims that the constitutional right "to be informed of the nature of the accusation" involves some information concerning the case he is called on to meet, which is not given by such a general charge as is here made. And courts are certainly bound to see to it that no such right is destroyed or evaded, while they are equally bound to carry out all legislative provisions tending to simplify practice, so far as they do not destroy rights.

The discussions on this subject sometimes lose sight of the principle that the rules requiring information to be given of the nature of the accusation are made on the theory that an innocent man may be indicted, as well as a guilty one, and that an innocent man will not be able to prepare for trial without knowing what he is to meet on trial. And the law not only presumes innocence, but it would be gross injustice unless it framed rules to protect the innocent.

The evils to be removed by the various acts concerning indictments consisted in redundant verbiage, and in minute charges which were not required to be proven as alleged. It was mainly, no doubt, to remove the necessity of averring what need not be proved as alleged, and therefore gave no information to the prisoner, that the forms were simplified. And these difficulties were chiefly confined to common-law offences. Statutory offences were always required to be set out with all the statutory elements. Koster *v.* People, 8 Mich. R. 431. The statute designed to simplify indictments for statutory crimes, which is in force in this state, and is a part of the same act before quoted, reaches that result by declaring that an indictment describing an offence in the words of the statute creating it, shall be maintained after verdict. *C. L.*, § *7928*. But both of these sections must be read in the light of the rest of the same statute, which plainly confines the omission of descriptive averments to cases where it will do no prejudice. And so it was held, in Enders *v.* People, 20 Mich. R. 233, that nothing could be omitted by virtue of this statute, which was essential to the description of an offence.

Manslaughter at common law very generally consisted of acts of violence, of such a nature that indictments for murder and manslaughter were interchangeable, by the omission or retention of the allegation of malice, and of the technical names of the offences. In a vast majority of cases a very simple allegation would be enough for the protection of the prisoner.

But where the offence of manslaughter was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which death was a consequential result, and sometimes not a speedy one, the ordinary forms were deficient, and the indictment had to be framed upon the peculiar facts, and could convey no adequate information without this. See 2 Bishop's Cr. Proced., § 538.

The offence for which the respondent in this case was put on trial, originated in the statute defining it, and could not have come within any of the descriptions of manslaughter at common law. An innocent person, charged under the information, could form no idea whatever from it of the case likely to be set up against him. He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault. But which one was meant, out of the multitudinous forms of indirect and consequential homicide that might occur after a delay of any time not exceeding a year, from an original wrong or neglect, and of which he might or might not have been informed, he could not readily conjecture. Nothing could inform him of this statutory charge, except allegations conforming to the statute. These, we think, he was entitled to have spread out upon the accusation. Without them he was liable to be surprised at the trial, and could not be expected to prepare for it.

We are not prepared to hold this information bad upon its face, for we are disposed to think, and it was practically admitted on the argument, that it may apply to the ordinary homicides by assault. It was not, therefore, until the evidence came in, that it was made certain the case was different. The question of sufficiency does not arise directly upon the record, but on the bill of exceptions, and the error was in permitting a conviction on it.

The other questions are closely connected with this, and need not be considered further.

It must be certified to the court below that the verdict should be set aside, and that no further proceedings on this charge should be had under this information as it stands.

The other Justices concurred.

COMMONWEALTH v. KELLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1903.

[*Reported* 184 *Mass.* 320.]

HAMMOND, J.[1] It is further argued by the defendant that, even if the evidence did show that he committed a crime, it was embezzlement and not larceny, that these two offences are different in law, and that since the count upon which he was convicted alleges larceny it is not supported by proof of embezzlement. It appears that at the trial the defendant urged this distinction, and requested the judge to rule that the evidence did not show him guilty of larceny, and to direct a verdict of acquittal. This the judge refused to do. He further requested the judge to rule that the statute which provides that "whoever embezzles, or fraudulently converts to his own use, money, . . . shall be deemed guilty of simple larceny," (Pub. Sts. c. 203, § 37,) does not merge the two offences or make the embezzlement larceny. The judge refused to make this ruling, "not because it was not true as a bare proposition of law but because it was not called for upon the facts disclosed."

The count evidently was drawn under R. L. c. 218, § 38, and it complies with the form set forth at the end of that chapter, under the title "larceny;" and the question is whether it covers the crime of embezzlement. The provisions of this chapter so far as material to this question first appear in St. 1899, c. 409, which was passed in accordance with the report and recommendation of the commissioners (see Senate Doc. No. 234 of that year) appointed under c. 85 of the Resolves of 1897, "to investigate and report upon a plan for the simplification of criminal pleadings, and to prepare a schedule of forms of pleadings to be used in criminal cases." Prior to that statute, although one guilty of embezzlement was, in the language of the statutes, "deemed . . . to have committed the crime of simple larceny," or in the later forms, "deemed guilty of simple larceny," still it was held that that kind of larceny was of a peculiar and distinctive character and that the indictment must contain, in addition to all the requisites of an indictment for larceny at common law, allegations setting forth the fiduciary relation, or the capacity in which the defendant acted. Accordingly it has been held that proof of embezzlement will not sustain an indictment charging merely a larceny, and that proof of larceny will not sustain a charge of embezzlement. Commonwealth *v.* Simpson, 9 Met. 138; Commonwealth *v.* King, 9 Cush. 284; Commonwealth *v.* Berry, 99 Mass. 428. Somewhat akin to these two crimes in many respects is that of obtaining money or goods by false pretences; and an indictment for this offence differs from that of larceny or embezzlement. It was felt by the commissioners that "the over-refined and illogical distinctions" between these three crimes "have led to scandalous abuses of justice by acquittals," and, "to obviate the possibility of miscarriage of justice on this account," they proposed "a single form of indictment for the three crimes, containing simply an allegation that defendant 'stole' certain goods." See 1899, Senate Doc. No. 234, pp. 16, 17. The St. of 1899, following the recommendation of the commissioners, contains a simple form for larceny, but no separate form for embezzlement or for obtaining money or goods by false pretences. In § 12, under the head of "Meaning of Words," it is provided that "the following words when used in an indictment shall be sufficient to convey the meaning herein attached to them;" and among others are these: "Stealing. — Larceny. — The criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretences." The count in question was drawn up under the provisions of this statute as subsequently enacted in R. L. c. 218, § 38. Under this last statute the word "steal" in an indictment becomes a term of art and includes the criminal taking or conversion in either of the three ways above named, and hence the indictment is sustained, so far as respects the criminal nature of the taking or conversion, by proof of any kind of larceny, embezzlement or criminal taking by means of false pretences. If it be objected that this construction makes the indictment so indefinite that the accused is not sufficiently informed of the nature of the charge which he is called upon to meet, the answer is that it is provided in the same statute

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[1] Only so much of the opinion as discusses the sufficiency of the indictment is given. — ED.

(§ 39) that "the court may, upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the" accusation, and, if requested by the accused, shall so order in all cases in which the court has final jurisdiction, where the accusation would not be otherwise fully, plainly, substantially and formally set out. "If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, in order to prepare for his defence, the defendant desires information as to the time and place of the alleged crime or as to the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid." This is a sufficient protection to the accused. Indeed it is manifest that since under the former practice the right to a bill of particulars was a matter that lay within the discretion of the court and therefore could not be claimed as of right, (Commonwealth *v.* Wood, 4 Gray, 11.) this statute, which makes the right to such a bill absolute, places the accused in a better position than he was before. Of course the bill of particulars cannot enlarge the scope of the indictment. It cannot specify a charge not covered by the indictment. Its only purpose is to specify more particularly the acts constituting the offence.

In view of these considerations we are of opinion that the count in question must be regarded as including within its "four corners" any criminal act of taking or conversion of money the property of the estate therein named, to the amount of $1,000, committed by the defendant within the jurisdiction of the court, and within the statute of limitations, whether the offence be larceny, embezzlement, or obtaining by criminal false pretences; and consequently that it covered the crime of embezzlement as described in Pub. Sts. c. 203, § 46, of which under instructions not objected to, except as above stated, the jury convicted the defendant.

It is further urged by the defendant that, inasmuch as the offence of which he was convicted was committed prior to the statute, it is as to that offence an *ex post facto* law, and for that reason unconstitutional as applied to his case. But this position is untenable. The statute neither creates a new crime nor in any way changes one existing at the time it took effect; nor does it increase or in any way affect the punishment for any crime. It does not establish any new presumption of fact or of law against the accused, nor in any other way alter any rule of evidence or the nature of the evidence required to convict. The defendant was tried for the same crime, under the same presumptions as to his guilt or innocence and under the same rules of evidence as he would have been tried before the statute. It relates purely to the matter of technical pleading as to the words to be used in setting forth a criminal act, and even in this respect is favorable to the accused in that the right to a bill of particulars, which theretofore was within the discretion of the court, has become absolute. In no respect is the situation of the accused changed to his disadvantage. No citation of authorities is needed to show that the statute as thus interpreted is not an *ex post facto* law within the meaning of either the Federal or State constitutions. The defendant was not prejudiced by the action of the court at the trial in dealing with his requests.[1]

STATE *v.* BROWN.

SUPREME COURT OF WISCONSIN. 1910.

[*Reported* 143 *Wis.* 405.]

AN indictment was returned by a grand jury impanelled in Marinette county, wherein it was attempted to charge the defendant, in the first count, with obtaining money by false pretences from Marinette county. The defendant demurred; and to review an order sustaining such demurrer and a judgment discharging the defendant, the state prosecutes a writ of error to this court.[2]

BARNES, J. This case comes before us by virtue of sec. 4724 *a*, Stats. (Laws of 1909, ch. 224), on a writ of error sued out to review the decision of the lower court in sustaining a demurrer to an indictment. It is the first cause brought to this court at the instance of the state to review a judgment in a criminal action since the above statute was enacted.

The defendant contends that the indictment is faulty in the following particulars: (1) In not averring that defendant *obtained* the money referred to in the various counts in the indictment.[3]

1. Sec. 4423, Stats. (1898), provides that "Any person who shall designedly, by any false pretences . . . and with intent to defraud, obtain from any other person any money," shall be punished as therein provided.

"The gravamen of the crime is the obtaining of the property described. . . . This statute, like other criminal statutes, must receive strict construction." Bates *v.* State, 124 Wis. 612, 615, 103 N. W. 251, and cases cited.

It is contended by the defendant that the allegation of the indictment, "By which false pretences the said *Thomas W. Brown* did then and there unlawfully and feloniously induce the said Marinette county to pay the said *Thomas W. Brown* the said sum of eighteen dollars and eighty cents of its money, good and lawful money of the United States, the said Marinette county then and there relying upon the said representations so made" does not charge that the defendant Brown *obtained* the money, or even that the county parted with it. It is urged that the word "induce" may well mean to persuade, to convince, or to tempt, and that defendant might tempt, persuade, or convince the county that it should pay the money in question, but that until he actually received it no crime was committed under the section of our statutes referred to. The following authorities are cited as sustaining the defendant's position: Comm. *v.* Lannan, 1 Allen, 590; State *v.* Phelan, 159 Mo. 122, 60 S. W. 71; Connor *v.* State, 29 Fla. 455, 30 Am. St. Rep. 126; State *v.* Lewis, 26 Kan. 123; Kennedy *v.* State, 34 Ohio St. 310. The point decided in each of the authorities cited is closely analogous to the one raised in the case before us, and the trial court with considerable reluctance concluded to follow the decided cases. No case decided under a similar statute has been called to our attention where an indictment such as the one before us has been held good.

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[1] See Com. *v.* King, 202 Mass. 379. — ED.

[2] This statement is substituted for that of the Reporter. — ED.

[3] Only so much of the opinion as deals with this objection to the indictment is given. — ED.

Precedents from foreign jurisdictions on matters of pleading and practice in criminal cases are often illusory and misleading. Some courts have adopted extremely strict and often highly technical rules for the construction of indictments and informations. Others have followed more liberal and more reasonable rules. In many of the states the rigor of rules formerly laid down has been mitigated by statute law. On a question such as the one before us the judgments of other tribunals may aid, but they cannot control or conclude this court.

The indictment in this case states that the defendant "did . . . induce said Marinette county to pay" him the sum of $18.80. Taking this language in its usual acceptation, it means that Marinette county paid over to the defendant, and that the defendant received and obtained from it, the sum stated, and it would, we think, be so construed by ninety-nine out of every hundred persons reading it. The learned counsel for the defendant frankly admitted on the argument that such was the impression it created on his mind when he first read it, and that he arrived at the conclusion that a different meaning might be attributed to it only after his industry had been rewarded by finding the cases cited.

If it be conceded that the language used might be susceptible of the meaning contended for by defendant, it does not follow that the indictment is bad, assuming that the language used would in its ordinary and usual acceptation be understood to mean that the defendant in fact obtained the money.

It has never been held in this state that certainty to a certain intent in particular was required in criminal pleading, although such certainty is, or at least formerly was, required in many jurisdictions. 1 Bouv. Law Dict. (Rawle's Rev.) 300, and cases cited. In State *v.* Downer, 21 Wis. 274, it was held that "certainty in charging the offence to a common intent is all that is required by the rules of pleading in regard to indictments." Such certainty is attained "by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one." 1 Bouv. Law Dict. (Rawle's Rev.) 299.

The letter as well as the spirit of our statute law is utterly antagonistic to the idea of applying exceedingly strict and technical rules to the construction of indictments or informations. This is particularly true where, as here, the defendant is not deprived of any substantial right by adopting a more liberal rule of construction and one more consonant with reason and better calculated to promote the ends of justice.

Sec. 4658, Stats. (1898), provides that an information shall be sufficient if it can be understood therefrom that the offence charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case. Sec. 4659 provides that no indictment or information shall be deemed invalid by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant. Sec. 4669 provides that words used in the statutes to define a public offence need not be strictly pursued in charging an offence under such statutes, but other words conveying the same meaning may be used. Sec. 4706 provides that no indictment or information in a criminal case shall be abated, quashed, or reversed for any error or mistake, where the person and the case may be rightly understood by the court, and the court may on motion order an amendment curing such defect.

Sec. 2829, Stats. (1898), provides that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. This statute has been held to apply to criminal as well as to civil cases. Odette *v.* State, 90 Wis. 258, 262, 62 N. W. 1054; Cornell *v.* State, 104 Wis. 527, 80 N. W. 745; Vogel *v.* State, 138 Wis. 315, 329, 119 N. W. 190. Sec. 2829, Stats. (1898), has to some extent been amplified by sec. 3072 *m*, Stats. (Laws of 1909, ch. 192).

Believing as we do that the language used in the indictment would in its ordinary acceptation be understood to charge the defendant with having received or obtained the money, and bearing in mind that it is not necessary to use the exact language of a statute in pleading, and being further convinced that the defect complained of does not tend to prejudice the defendant, we feel no hesitancy in saying that the demurrer should not have been sustained on the ground upon which it was held good. The indictment states an offence under the Downer Case, cited *supra*. To hold the pleading bad would be to ignore that decision as well as the statutes cited. The statutes referred to should be so construed as to effectuate the purpose which the legislature had in mind in passing them. State ex rel. McKay *v.* Curtis, 130 Wis. 357, 110 N. W. 189.

The rights of a defendant in a criminal case should be jealously and scrupulously guarded and protected by the courts. But this does not mean that a person accused of crime should be turned loose on mere technicalities which in no way involve the merits of the case. Such maladministration of our criminal law should not be encouraged or tolerated. If the defendant in this case did not obtain the moneys charged in the various counts in the indictment, he has a perfect defence to each and every count therein contained and is not deprived of any right to avail himself of such defence.

CHAPTER XVI.

FORMER CONVICTION OR ACQUITTAL.

SECTION I.

Double Jeopardy.

VAUX'S CASE.

QUEEN'S BENCH. 1592.

[*Reported* 4 *Coke*, 44 *a*.]

WILLIAM VAUX, at the sessions of peace for the county of Northumberland, held 27 *Julii, anno* 32 Eliz. before the justices of peace of the same county, was indicted of voluntarily poisoning of Nicholas Ridley, which indictment was removed into the King's Bench; and in discharge thereof the said Vaux pleaded that at another time, *sc.* 12 *Augusti, anno* 30 Eliz., at Newcastle upon Tyne, in the county of Northumberland, before the Justices of Assise of the same county the said Vaux was indicted: *quod cum Nick' Ridley nuper de W. in com' præd' Armig' jam defunctus, per multos annos ante obitum suum nuptus fuisset cuidam Margaretæ uxori ejus, et nullum exitum habuit, præd' Will' Vaux nuper de K. in com' C. generos' subdolè, cautè, et diabolicè intendens mortem, venenationem, et destructionem ipsius Nicolai, et Deum præ oculis non habens, 20 Decembris, anno 28 Eliz. apud W. prædict' felonicè, voluntariè, et ex malitia sua precogitata, persuadebat eundem Nichol' recipere et bibere quendam potum mixtum cum quodam veneno vocat' cantharides, affirmans et verificans eidem Nick' quod' præd' potus sic mixtus cum præd' veneno vocat' canth' non fuit intoxicatus* (*Anglicè* poisoned) *sed quod per reception' inde præd' Nick' exit' de corpore dictæ Margaretæ tunc uxoris suæ procuraret, et haberet ratione cujus quidem persuasionis et instigationis præd' Nick' postea, scil. 16 Januarii anno supradicto apud T. in com' N. præd' nesciens prædictum potum cum veneno in forma prædict' fore mixt', sed fidem adhibens prædict' persuasioni dicti Willielmi recepit et bibit, per quod prædictus Nicholaus immediatè post receptionem veneni prædicti per tres horas immediatè sequent' languebat, et postea præd' 16 Jan. anno supradict' ex venenatione et intoxicat' præd' apud T. præd' obiit: et sic præd' Will' Vaux felonicè et ex malitia sua præcogitata præfat' Nick' voluntariè et felonicè modo et forma præd' intoxicavit, interfecit, et murdravit, contra pacem, &c.* Upon which indictment the said Vaux was arraigned before the same Justices, and pleaded not guilty; and the jurors gave a special verdict, and found, *quod præd' Nich' Ridley venenatus fuit Anglicè* poisoned, *per receptionem præd' cantharides, et quod præd' Will' Vaux non fuit præsens tempore quo præd' Nich' Ridley recepit præd' canth' sed utrum, &c.* And thereupon judgment was given by the said justices of assise in this manner: *super quo visis, et per cur' hic intellectis omnibus et singulis præmissis, pro eo quod videtur cur' hic super tota materia per veredictum præd' in forma præd' compert', quod præd' venenatio per reception' canth' et præd' procuratio præd' Will' ad procurand' præd' Nich' ad accipiend' præd' canth' modo et forma prout per verdict' præd' compert' fuit non fuit felonia et murdrum voluntar': ideo considerat' est quod præd' Will' Vaux, de felonia et murdro præd' indictamento præd' superius specificat' necnon de dicta felonica venenatione præd' Nich' Ridley in eodem indictamento nominati eidem Will' imposit' eat sine die:* and as to the felony and murder he pleaded not guilty.

And, first, it was resolved *per totam curiam* that the said indictment upon which Vaux was so arraigned was insufficient; and principally because it is not expressly alleged in the indictment that the said Ridley received and drank the said poison, for the indictment is *præd' Nich' nesciens præd' potum cum veneno fore intoxicatum, sed fidem adhibens dict' persuasioni dicti W. recepit et bibit, per quod, &c.* So that it doth not appear what thing he drank, for these words (*venenum præd'*) are wanting; and the subsequent words, *scilicèt per quod prædict' N. immediatè post receptionem veneni prædict' &c.*, which words imply receipt of poison, are not sufficient to maintain the indictment, for the matter of the indictment ought to be full, express, and certain, and shall not be maintained by argument or implication, because the indictment is found by the oath of laymen. 2. It was agreed *per curiam* that Vaux was a principal murderer, although he was not present at the time of the receipt of the poison, for otherwise he would be guilty of such horrible offence, and yet should be unpunished, which would be inconvenient and mischievous: for every felon is either principal or accessory, and if there is no principal there can be no accessory, *quia accessorium sequitur principalem;* and if any had procured Vaux to do it, he had been accessory before; *quod nota* a special case, where the principal and accessory also shall both be absent at the time of the felony committed. 3. It was resolved by the Lord Wray, Sir Thomas Gawdy, Clench, and Fenner, Justices, that the reason of *auterfoits acquit* was because where the maxim of common law is that the life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offence is a good plea; yet it is intendable of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason he was not *legitimo modo acquietatus*, and that is well proved, because upon such acquittal he shall not have an action of conspiracy, as it is agreed in 9 E. 4. 12 a. b. *vide* 20 E. 4, 6.

And in such case in appeal, notwithstanding such insufficient indictment, the abettor shall be enquired of as it is there also held: and although the judgment is given that he shall be acquitted of the felony, yet this acquittal shall not help him, because he was not *legitimo modo acquietatus;* and when the law saith that *auterfoits acquitted* is a good plea, it shall be intended when he is lawfully acquitted; and that agrees with the old book in 29 E. 3, *Corone* 444, where it is agreed if the process upon indictment or appeal is not sufficient, yet if the party appears (by which all imperfections of the process are saved) and is acquitted, he shall be discharged; and if the appeal or indictment is insufficient (as our case is) there it is otherwise: but if one, upon an insufficient indictment of felony, has judgment, *quod suspend' per coll'*, and so attainted, which is the judgment and end which the law has appointed for the felony, there he cannot be again indicted and arraigned until this judgment is reversed by error; but when the offender is discharged upon an insufficient indictment, there the law has not had its end; nor was the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offences should go unpunished, which was grounded without question upon these ancient maxims of law and state; *maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinquendi, et minatur innocentes qui parcit nocentibus:* so if a man be convicted either by verdict or confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end; and afterwards, upon a new indictment, the said Vaux was tried and found guilty, and had his judgment and was hanged.

REGINA *v.* DEANE.

LIVERPOOL WINTER ASSIZES. 1851.

[*Reported* 5 *Cox C. C.* 501.]

THE prisoner was indicted for forging the acceptance to a bill of exchange for £154 16*s.* 3*d.*

The jury had been sworn and charged to inquire into the guilt of the prisoner.

Simon, for the prosecutor, had opened the case, when

Monk, for the prisoner, having come into court during the opening of the learned counsel for the prosecution, informed his lordship that the prisoner was not prepared with his defence; upon which

ERLE, J., discharged the jury from giving a verdict, observing that, with the consent of both parties, there was power to do so; and such consent being then given, the trial was accordingly postponed to the following day. His lordship added that Mr. Baron Parke held the same opinion.

COMMONWEALTH *v.* ALDERMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1808.

[*Reported* 4 *Mass.* 477.]

THE defendant being arraigned on an indictment for an assault and battery, and being enquired of by the clerk whether he was guilty or not guilty, said that he was guilty, but added that he had himself informed a justice of the peace for the county of his offence, by whom he had been sentenced to pay a fine, &c.

The Court directed the clerk to enter the plea of guilty alone observing that it had heretofore been solemnly determined that a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself was no bar to an indictment by the grand jury for the same offence.[1]

COMMONWEALTH *v.* GREEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1822.

[*Reported* 17 *Mass.* 515.]

PARKER, C. J.[2] The prisoner having been convicted by the verdict of a jury of the crime of murder at the last term of the court, moved for a new trial; because, as alleged in his motion, one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of larceny, in a court having jurisdiction of the offence within the State of New York; whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this Commonwealth. A copy of the record of that conviction has been produced in support of the motion; and sufficient evidence has been given to satisfy the court, for the purpose of sustaining this motion, that the Sylvester Stoddard, who was sworn and examined on the trial of the prisoner, was the subject of that conviction. It appeared also that judgment was rendered upon that conviction, and was executed upon the convict, within the public prison of the State of New York.

It has been argued by the attorney and solicitor-general that by law a new trial cannot be granted of a capital felony; and it appears by the English text-books, and by several decisions cited in support of the position, that in cases of felony, a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here.

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[1] "A like decision was made in Low's case, about A. D. 1783. In neither case was there any notice to the party injured." 6 Dane Abr. 732. — ED.

[2] Part of the opinion only is given. — ED.

That a prisoner, who has been tried for a felony, and acquitted, should not be subjected to a second trial for the same offence, seems consistent with the humane principles of the common law, in relation to those whose lives have been once put in jeopardy. But the same humane principles would appear to require that after a conviction, a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which rendered doubtful the justice or legality of his conviction. *Nemo bis debet vexari pro unâ et eâdem causâ* is a maxim of justice, as well as of humanity; and was established for the protection of the subject against the oppressions of government. But it does not seem a legitimate consequence of this maxim that one who has been illegally convicted should be prevented from having a second inquiry into his offence; that he may be acquitted, if the law and the evidence will justify an acquittal.

It is true that, in England, the utmost caution is used on capital trials in favor of life; and if an irregularity materially affecting the trial occurs to the injury of the accused, the court usually represents such matter to the crown, and a pardon is generally granted. But it is the right of every subject of that country, and of every citizen of this, to have a fair and legal trial before his peers, the jury; and it is hardly consistent with that right, that it should be left to the will or discretion of the judge whether a representation of an actual irregularity shall be made to the pardoning power; or to the discretion of the latter, whether that power shall be exercised in favor of a person unlawfully convicted.

Where the error appears of record, in either country, the court will arrest the judgment after a verdict of guilty; and the party may be again indicted and tried for the same offence. If the error does not appear of record, but arises from inadvertency of the judge, in rejecting or admitting evidence, or from misbehavior of the jury, or other cause which would be good ground for a new trial in civil actions or misdemeanors, justice and consistency of principle would seem to demand that the person convicted should, upon his own motion, have another trial; instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it. It is not enough, that the life of the accused will generally be safe in the hands of such highly responsible public agents. The right of the subject to be tried by his peers, according to the forms, as well as principles, of law, is the only certain security that "at all times and under all circumstances" that protection which the constitution extends to all will be effectually enjoyed.

Nor is it for the public safety and interest that new trials should be refused in such cases. For it must be obvious that in most cases of irregularity which would be a good cause for another trial if in the power of the court to grant it, a pardon, upon the representation of the court, would be thought to follow of course; and thus, in many cases, public justice might be prevented on account of defect in form, or some irregularity not affecting the merits of the case, which mischief might be avoided by another trial.

For these reasons we think there is a power in this court to grant a new trial on the motion of one convicted of capital offence, sufficient cause being shown therefor; notwithstanding the English courts are supposed not to exercise such authority; and if this opinion needs support, the case of John Fries, who, after conviction of treason, was tried a second time, and the case in South Carolina, cited at the bar from Bay's reports, are sufficient for this purpose. In the case of the United States *v.* Fries, Mr. Rawle, the district attorney, admitted the power of the court to grant a new trial, and argued only against the propriety of exercising the power in that case. Judge Iredell expressly admitted the power; and Judge Peters, who was against a new trial, although he yielded to the Circuit Judge, did not deny the authority of the court to grant it. In a late case also, in New York, The People *v.* Goodwin, which was a case of felony, it was decided that the cause might be taken from the jury, and a new trial ordered.

COMMONWEALTH *v.* LOUD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported* 3 *Met.* 328.]

THE defendant was tried in the Court of Common Pleas, before WARREN, J., on an indictment found at April term, 1841, charging him with feloniously stealing, &c., certain lumber. After the testimony against him had been introduced, and the judge had instructed the jury that the testimony, if believed by them, proved a larceny, the defendant proposed to prove a prior conviction of the same offence, as a bar to this indictment; and offered, for that purpose, a record of certain proceedings before a justice of the peace in and for this county. On inspecting that record, it appeared that L. H. Loud, in January, 1841, presented a complaint to said Justice, in which he alleged that on the 10th of August, 1840, certain lumber (admitted to be the same that was described in the indictment) was feloniously taken, stolen, and carried away, and that the complainant had probable cause to suspect, and did suspect, that the defendant did feloniously take, steal and carry away the same; that the said justice thereupon issued a warrant against the defendant, on which the defendant was carried before the justice and arraigned; that the defendant pleaded that he was not guilty, and that after a full hearing the justice found him guilty, and imposed on him a fine of ten dollars with costs of prosecution.

It was proved or admitted that the defendant paid the said fine and costs.

The judge ruled that said proceedings did not constitute a bar to this prosecution, and the jury found the defendant guilty. To this ruling the defendant excepted.

PUTNAM, J. This case comes before us on exceptions to the ruling of the Court of Common Pleas, and we decide it on the last which appears to be made, namely, that the defendant offered to prove the record and proceedings of a prior conviction for the same offence, before a justice of the peace, as a bar, but that the court ruled that the same did not constitute a bar to this prosecution. And the attorney-general admits that this case is to be taken and considered by the court as if that plea had been formally made with proper averments; that the larceny of which the defendant was convicted was of the same property for the stealing of which he has been again indicted and convicted; and that the defendant submitted to the former judgment, and performed the sentence. But it is contended for the Commonwealth, that the supposed former conviction was not only erroneous, but was merely void.

In the case of Commonwealth *v.* Phillips, 16 Pick. 211, it was held that a conviction, on a complaint in similar form to that which was used in the case at bar, was erroneous; and the judgment was arrested. The defendant excepted to that judgment, as he well might. But in the case at bar, the defendant waived any exception to the judgment, complaint, proceedings, or sentence; and he has performed the sentence.

The Commonwealth now desire to have those proceedings held for nothing, so that, by an indictment in technical and legal form, the defendant may be again tried and punished for the same offence of which he has been informally convicted. We cannot think that those proceedings before the magistrate were merely void. On the contrary, it is reasonable to believe that the complainant intended to prosecute for a larceny. The defendant understood it so, and so did the magistrate. Now the judgment that the defendant was guilty, although upon proceedings which were erroneous, is good until the same be reversed. This rule of criminal law is well settled. It was the right and privilege of the defendant to bring a writ of error, and reverse that judgment; which writ would have been sustained by the case before cited of Commonwealth *v.* Phillips; but he might well waive the error and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offence. Vaux's case, 4 Co. 45; 2 Hale P. C. 251; 2 Hawk. c. 36, § 10, *et seq.*; 1 Stark. Crim. Pl. (2d ed.) 329, 330.

The evidence which was offered, we think, constituted a good defence to the indictment. The bill of exceptions is sustained. Therefore the verdict should be set aside, and the defendant should go thereof discharged, without day.

UNITED STATES *v.* BALL.

Supreme Court of the United States. 1896.

[*Reported* 163 *U. S.* 662.]

Gray, J.[1] At October term, 1889, of the Circuit Court of the United States for the Eastern District of Texas, the grand jury returned an indictment against Millard Fillmore Ball, John C. Ball and Robert E. Boutwell, for the murder of William T. Box, alleging that the defendants, being white men and not Indians, on June 26, 1889, in Pickens county, in the Chickasaw Nation, in the Indian Territory, did unlawfully and feloniously, and with their malice aforethought, and with a deadly weapon, to wit, a gun, held in their hands. and loaded and charged with gunpowder and leaden balls, make an assault upon the body of William T. Box, and "did shoot off and discharge the contents of said gun in and upon the body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish, and languishing did die."

Upon that indictment, the three defendants were arraigned, and pleaded not guilty, and were tried together upon the issues so joined. The trial began on Wednesday, October 30, 1889, and proceeded from day to day until Saturday, November 2, when the jury retired to consider of their verdict, and no verdict having been returned at the usual hour of adjournment, the court was kept open to receive the verdict. On Sunday, November 3, 1889, the jury returned a verdict as follows: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment; and we find M. Fillmore Ball not guilty." The court, on the same day, made the following order: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty, as charged in the indictment herein, and as found by the jury; and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar county, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day."

Afterwards, at the same term, John C. Ball and Robert E. Boutwell were adjudged guilty and sentenced to death, and sued out a writ of error from this court; and in the assignment of errors filed by them in the Circuit Court, (as appears by the record transmitted to this court in that case,) specified among other things, "because no legal indictment was returned into court against respondents," in that the indictment on which they were tried "nowhere alleges when and where said William T. Box died;" and "for the errors stated and apparent upon the record therein, respondents pray that the judgment be reversed, and the cause remanded for a new trial." And the brief then filed in their behalf concluded by submitting that the judgment ought to be reversed, and the indictment dismissed.

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[1] Only so much of the opinion as discusses the question of former jeopardy is given. — Ed.

Upon that writ of error, this court, at October term, 1890, held that that indictment, although sufficiently charging an assault, yet, by reason of failing to aver either the time or the place of the death of Box, was fatally defective, and would not support a sentence for murder; and therefore reversed the judgments against John C. Ball and Robert E. Boutwell, and remanded the case with directions to quash the indictment, and to take such further proceedings in relation to them as to justice might appertain. Ball *v.* United States, 140 U. S. 118, 136.

At April term, 1891, of the Circuit Court, that indictment was dismissed; and the grand jury returned against all three defendants a new indictment, (being the one now before the court,) like the former one, except that, after charging the assault, with malice aforethought, and with a loaded gun, upon Box on June 26, 1889, in Pickens county in the Indian Territory, it went on to charge that the three defendants "did then and there shoot off and discharge the contents of said gun at, in and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid."

To this indictment the defendant Millard F. Ball filed a plea of former jeopardy and former acquittal, relying upon the trial, the verdict of acquittal, and the order of the court for his discharge, upon the former indictment; a certified copy of the record of the proceedings upon which was annexed to and made part of his plea.

The defendants John C. Ball and Boutwell filed a plea of former jeopardy, by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment.

Both those pleas were overruled by the court, and the three defendants then severally pleaded not guilty.

At the trial, it appeared that William T. Box was killed on June 26, 1889; the defendants offered in evidence the record of the proceedings upon the former indictment; and it was admitted by all parties that the offence charged in the former indictment and that charged in the present indictment was one and the same transaction and offence, to wit, the killing of Box by the three defendants; that the defendants in the two indictments were the same persons; and that no writ of error was ever sued out upon the judgment or order entered upon the former indictment as to Millard F. Ball.

The Circuit Court, among other instructions, instructed the jury to find against both pleas of former jeopardy, because this court had decided that the former indictment was insufficient as an indictment for murder. The jury returned a verdict of guilty of murder against all three defendants; each of them was adjudged guilty accordingly, and sentenced to death; and thereupon they sued out this writ of error.

The first matter to be considered is the effect of the acquittal of Millard F. Ball by the jury upon the trial of the former indictment.

In England, an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal. 2 Hale P. C. 248, 394; 2 Hawk. P. C. c. 35, § 8; 1 Stark. Crim. Pl. (2d ed.) 320; 1 Chit. Crim. Law, 458; Archb. Crim. Pl. & Ev. (19th ed.) 143; 1 Russell on Crimes (6th ed.), 48. And the general tendency of opinion in this country has been to the same effect. 3 Greenl. Ev. § 35; 1 Bishop's Crim. Law, § 1021, and cases there cited.

The foundation of that doctrine is Vaux's case, 4 Rep. 44, in which William Vaux, being duly indicted for the murder of Nicholas Ridley by persuading him to drink a poisoned potion, pleaded a former acquittal, the record of which set forth a similar indictment alleging that Ridley, not knowing that the potion was poisoned, but confiding in the persuasion of Vaux, took and drank (without saying "took and drank said potion"); a pléa of not guilty; a special verdict, finding that Ridley was killed by taking the poison, and that Vaux was not present when he took it; and a judgment rendered thereon that the poisoning of Ridley and persuading him to take the poison, as found by the verdict, was not murder, and that the defendant go without day — *eat sine die.* Upon a hearing on the plea of *autrefois acquit*, the Court of Queen's Bench was of opinion that Vaux was a principal, although not present when Ridley took the poison; but that the indictment was insufficient, for not expressly alleging that Ridley drank the poison; and that "because the indictment in this case was insufficient, for this reason he was not *legitimo modo acquietatus*," "nor was the life of the party, in the judgment of the law, ever in jeopardy."

Yet the decision in Vaux's case was treated, both by Lord Coke and by Lord Hale, as maintainable only upon the ground that the judgment upon the first indictment was *quod eat sine die*, which might be given as well for the insufficiency of the indictment, as for the defendant's not being guilty of the offence; and Lord Hale was clearly of opinion that a judgment *quod eat inde quietus* could not go to the insufficiency of the indictment, but must go to the matter of the verdict, and would be a perpetual discharge. 3 Inst. 214; 2 Hale P. C. 394, 395. And Mr. Starkie has observed: "The doctrine expounded in this case does not appear to consist with the general principle on which the plea of *autrefois acquit* is said to depend, since an acquittal upon a special verdict would leave the defendant exposed to a second prosecution, whenever a formal flaw could be detected in the first indictment at any subsequent period." 1 Stark. Crim. Pl. 320, note.

In the leading American case of People *v.* Barrett, 1 Johns. 66, while a majority of the court, consisting of Chief Justice Kent and Justices Thompson and Spencer, followed the English authorities, Justices Livingston and Tompkins strongly dissented, and their reasons were fully stated by Mr. Justice Livingston, who, after distinguishing cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant, as well as cases in which the defendant himself had suggested the imperfection in the first indictment, and thereupon obtained judgment in his favor, said: "These defendants have availed themselves of no such imperfection, if any there were, nor has any judgment to that effect been pronounced. This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offence.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking farther; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits. But reverse the case, and suppose an acquittal to take place, the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no venue, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*." 1 Johns. 74.

In Commonwealth *v.* Purchase, 2 Pick. 521, 526, Chief Justice Parker, speaking of the doctrine which allows a man to be tried again after being acquitted on an indictment substantially bad, said that "ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment;" but that this "is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case."

In the Revised Statutes of Massachusetts of 1836, c. 123, §§ 4, 5, provisions were inserted, which, as the commissioners who reported them said, were "intended to define and determine, as far as may be, the cases in which a former acquittal shall, or shall not, be a bar to a subsequent prosecution for the same offence;" and were as follows: "No person shall be held to answer on a second indictment, for any offence of which he has been acquitted by the jury upon the facts and merits, on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offence, notwithstanding any defect in the form or in the substance of the indictment on which he was acquitted. If any person, who is indicted for an offence, shall on his trial be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form or to the substance of the indictment, he may be arraigned again on a new indictment, and may be tried and convicted for the same offence, notwithstanding such former acquittal." Similar statutes have been passed in other States. 1 Lead. Crim. Cas. (2d ed.) 532.

The American decisions in which the English doctrine has been followed have been based upon the English authorities, with nothing added by way of reasoning.

After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.

The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence. Commonwealth *v.* Peters, 12 Met. 387; 2 Hawk. P. C. c. 35, § 3; 1 Bishop's Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. *Ex parte* Parks, 93 U. S. 18. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. United States *v.* Sanges, 144 U. S. 310. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case.

The former indictment set forth a charge of murder, although lacking the requisite fulness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge, of murder, as well as of any less offence included therein. Rev. Stat., § 1035. That he was thereupon discharged by the Circuit Court by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment, is clearly shown by the fact that the court, by the same order which discharged him, committed the other defendants, found guilty by the same verdict, to custody to await sentence, and afterwards adjudged them guilty and sentenced them to death upon that indictment. Millard F. Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only.

It is true that the verdict finding John C. Ball and Robert E. Boutwell guilty as charged in the indictment, and finding Millard F. Ball not guilty, was returned on Sunday; as well as that the order thereupon made by the court, by which it was considered that the first two defendants were guilty as charged in the indictment and found by the jury, and be remanded to custody to await the judgment and sentence of the court, and that Millard F. Ball be discharged and go without day, was made on the same day. That order, indeed, as already adjudged by this court, could not have effect as a judgment against the two defendants who had been convicted, because no judgment can lawfully be entered on Sunday. Ball *v.* United States, 140 U. S. 118, 131; 3 Bl. Com. 277. But when a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday. This has been generally put upon the ground that the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion; or that it is an act of necessity; and it certainly tends to promote the observance of the day more than would keeping the jury together until Monday. Hoghtaling *v.* Osborn, 15 Johns. 119; Van Riper *v.* Van Riper, 1 Southard (4 N. J. Law), 156; Huidekoper *v.* Cotton, 3 Watts, 56; Baxter *v.* People, 3 Gilman, 368, 385; Hiller *v.* English, 4 Strob. 486; Cory *v.* Silcox, 5 Indiana, 370; Webber *v.* Merrill, 34 N. H. 202; Reid *v.* State, 53 Alabama, 402; Meece *v.* Commonwealth, 78 Kentucky, 586, 588; State *v.* Ford, 37 La. Ann. 443, 466.

As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence. United States *v.* Sanges, 144 U. S. 310; Commonwealth *v.*

Tuck, 20 Pick. 356, 365; West *v.* State, 2 Zabriskie (22 N. J. Law), 212, 231; 1 Lead. Crim. Cas. 532.

For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal.

It therefore becomes unnecessary to consider any of the other questions raised at the trial which affect Millard F. Ball only; and we proceed to consider those affecting the other defendants, John C. Ball and Robert E. Boutwell.

Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted. Hopt *v.* Utah, 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430; Regina *v.* Drury, 3 Cox Crim. Cas. 544; *S. C.* 3 Car. & Kirw. 193; Commonwealth *v.* Gould, 12 Gray, 171. The court therefore rightly overruled their plea of former jeopardy; and cannot have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

BRENNAN *v.* THE PEOPLE.

SUPREME COURT OF ILLINOIS. 1854.

[*Reported* 15 *Illinois,* 511.]

TREAT, C. J.[1] An indictment for the murder of Albert Story was found against Kern Brennan, James Tewey, Michael Tewey, Martin Ryan, and eight other persons, at the November term, 1853, of the La Salle Circuit Court. The defendants were arraigned during the same term, and pleaded not guilty to the indictment. The prisoners were then put upon their trial. The jury found Kern Brennan, James Tewey, and Michael Tewey guilty of the murder of Story. They also found Martin Ryan guilty of manslaughter, and fixed the period of his imprisonment in the penitentiary at eight years. The record then recites: "Thereupon come the defendants, and move for a new trial herein; and the court being advised, sustains the motion, and grants a new trial." The same defendants were again put upon their trial for the murder of Story, at the May term, 1854. The jury found the four prisoners guilty of murder, and sentence of death was passed upon them.

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[1] Only so much of the case as involves the question of double jeopardy is given. — ED.

Was the prisoner, Ryan, properly put upon his trial a second time for the murder of Story? An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment, the jury may find the prisoner guilty of manslaughter. And such a finding amounts to an acquittal of the charge of murder. The finding of the inferior is necessarily a discharge of the superior offence. Ryan was regularly put upon his trial on the indictment, and was found guilty of manslaughter. In contemplation of law, the jury rendered two verdicts as to him; one acquitting him of the murder of Story; the other convicting him of the manslaughter of Story. He was thus legally tried for the offence of murder and acquitted. It is perfectly clear that he could not again be put in jeopardy on the same charge, unless that acquittal was set aside at his instance. A verdict either of acquittal or conviction is a bar to a subsequent prosecution for the same offence, although no judgment has been entered upon it. Mount *v.* The State, 14 Ohio, 295; The State *v.* Norvell, 2 Yerger, 24; Hunt *v.* The State, 25 Miss. 378. It does not appear from the record that Ryan has ever waived the benefit of the verdict of acquittal. It is true that he united with the other prisoners in asking for a new trial, but that application as to him must be regarded as extending only to the charge upon which he was convicted. He had no occasion for another trial, except as to the charge of manslaughter. Being legally acquitted of the charge of murder, he surely did not desire that to be again investigated. It is not to be presumed that he would voluntarily place himself in peril upon a charge, on which he had already been tried and acquitted. Even if the court, upon his motion, could open the whole case, the record does not show that such a power was either invoked or exercised. The application for a new trial did not necessarily relate to the charge upon which he was acquitted. It naturally referred to the charge on which he was convicted. Nor did the court, in terms, set aside the entire finding of the jury. It simply granted the prisoners a new trial. The order was no broader than the application. There were two distinct findings as to Ryan, and, therefore, there was not the least necessity for disturbing the one acquitting him of murder. The one might be set aside, and the other be allowed to stand. The verdict was not an entire thing, which should wholly stand or fall. This view gives full effect to the order of the court. There was still a charge upon which Ryan could be again tried. This view of the question is sustained by adjudged cases. The case of Campbell *v.* The State, 9 Yerger, 333, is strongly in point. The prisoner was tried upon an indictment containing three counts. He was acquitted on the first and third counts, and convicted on the second. He entered a motion for a new trial, and the court, in sustaining it, set aside the entire finding of the jury. On the second trial, he objected to being tried on the counts upon which he had been acquitted; but the court ordered him to be tried on the whole indictment. On this trial, he was acquitted on the first and second counts, and convicted on the third. On error, it was held that he was entitled to judgment of acquittal upon the first and third counts, because as to them he was legally discharged on the first trial; and that he was entitled to the same judgment on the second count, because as to that he was acquitted upon the second trial. The court remarked: "It is not necessary to determine how far a party could be held, even to an express waiver of the benefit of a verdict of acquittal. It is enough, that in this case he has not done so. He moved for a new trial. We are not to suppose his application was more extensive than his necessities. As he had been acquitted upon two counts, he could have no motive to ask for another trial, except upon the one on which he was found guilty; and we are not to understand his application as going further. But the record shows that the judge, in granting a new trial, set aside the verdict. This was error; it improperly revived the proceedings upon those counts upon which he was acquitted. But although they were improperly revived, it was error to try the defendant a second time upon them. Having been once tried upon all the counts and acquitted of some of them, to try him again upon the same counts would be putting him in jeopardy a second time for the same charge." The same doctrine is recognized in the cases of Slaughter *v.* The State, 6 Humph. 410; Morris *v.* The State, 8 S. & M. 762; and Hunt *v.* The State, 25 Miss. 378.

In the opinion of the court, Ryan was improperly tried a second time for the murder of Story. He had previously been tried for that offence, and his innocence legally established. The verdict of acquittal remained in full force; and he could not again be put in jeopardy on the same charge, without the violation of an express provision of the constitution.

The judgment as to Ryan must be reversed, and the cause will be remanded. He may still be put upon his trial on the charge of manslaughter. As respects the other prisoners, the judgment must be affirmed. *Judgment affirmed.*

TRONO *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1905.

[*Reported* 199 *U. S.* 521.]

THE plaintiffs in error were proceeded against in the court of first instance of the province of Bulacan, Philippine Islands, upon a complaint accusing them of causing the death of Benito Perez "with great cruelty and evident premeditation . . . by means of blows given with the butts of guns, they coöperating one with the other." In other words, the accused were complained of as guilty of murder in the first degree.

They were tried in the court above mentioned and were acquitted of the crime of murder and convicted of the crime of assault, which is included in the crime of murder charged in the complaint, and they were therefore sentenced by the court to suffer a penalty of six months' imprisonment and to pay a certain sum to the heirs of Perez, with subsidiary imprisonment in case of insolvency.

All three of the accused appealed to the Supreme Court of the Philippine Islands from the judgment and sentence of the trial court. The Supreme Court, having heard the case, reversed the judgment of the court of first instance and convicted the accused of the crime of homicide (in substance, murder in the second degree), which is included in and is a lower degree of the crime charged in the complaint, but is a higher degree of crime than that of which the accused were convicted in the court below. Two of them (Angeles and Trono) were sentenced to fourteen years, eight months and one day, and Natividad to imprisonment for eight years and one day, and all three to the payment of an indemnity to the heirs of the deceased.

The accused have brought the case here by writ of error to the Supreme Court of the Philippine Islands, for the purpose of reviewing the judgment of that court.

Peckham, J. The plaintiffs in error seek a reversal of the judgment in their case on the ground that the Supreme Court of the Philippine Islands had no power to reverse the judgment of the court of first instance, and then find them guilty of a higher crime than that of which they had been convicted in that court, and of which higher crime that court had acquitted them, and they contend that such conviction by the Supreme Court of the Islands was a violation of the act of Congress, passed July 1, 1902, 32 Stat. 691, a portion of the fifth section of that act providing that "no person for the same offence shall be twice put in jeopardy of punishment."

This language is to be found in connection with other language in the same act, providing for the rights of a person accused of crime in the Philippine Islands. The whole language is substantially taken from the Bill of Rights set forth in the Amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the Thirteenth Amendment, and also prohibiting the passage of bills of attainder and *ex post facto* laws.

The important question to be determined is, whether this action of the Supreme Court of the Islands did violate the act of Congress, by placing the accused twice in jeopardy.

The meaning of the phrase, as used in the above-mentioned act of Congress, was before this court in Kepner *v.* United States, decided in May, 1904, 195 U. S. 100, where will be found a very full discussion of the subject. The plaintiff in error in that case had been acquitted of the crime charged against him in the court of first instance, but the Government, not being satisfied with the decision, appealed to the Supreme Court, and that court reversed the judgment of acquittal and found Kepner guilty of the crime of which the court of first instance had acquitted him, and sentenced him to a term of imprisonment, and suspended him from any public office or public trust, and deprived him of the right of suffrage. This court, upon writ of error, held that, in reversing upon the appeal of the Government, the judgment of the court of first instance, and itself convicting the accused and pronouncing judgment against him, the Supreme Court of the Islands violated the provision in question, and its judgment was therefore reversed and the prisoner discharged. It was also held that the Government had no power to obtain a review of a judgment or decision of the trial court acquitting an accused party, and that the phrase in question was to be construed as the same phrase would be construed in the instrument from which it was originally taken, viz., the Constitution of the United States, and that the settled and well-known meaning of the language, as used in the Constitution, must also be taken when the same language is used in the act of Congress, and not as it might possibly be construed with reference to Spanish law or Spanish procedure.

The difference between that case and the one now before the court is obvious. Here the accused, while acquitted of the greater offence charged in the complaint, were convicted of a lesser offence included in the main charge. They appealed from the judgment of the court of first instance and the Government had no voice in the matter of the appeal, it simply followed them to the court to which they appealed. We regard that fact as material and controlling. The difference is vital between an attempt by the Government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal, even though that judgment, while convicting him of the lower offence, acquits him of the higher one charged in the complaint.

We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offence, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offence set forth in the indictment, or must the trial be confined to that offence of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

This question has given rise to much diversity of opinion in the various state courts. Many of them have held that the new trial must be confined to the lesser offence of which the accused had been convicted on the first trial, while other courts have held precisely the contrary, and that upon a new trial the whole case was open as if there had been no former trial. Most, if not all, of these two classes of cases have been cited by the respective counsel in this case and will be found in their briefs herein. It would be unprofitable to cite and refer to each of them in detail here. They have been carefully examined.

Those cases which limit the new trial proceed upon the ground, as stated in People *v.* Dowling, 84 N. Y. 478, 483, by Folger, Chief Judge, as follows:

"The matter at the bottom is the constitutional provision that 'No person shall be subject to be twice put in jeopardy for the same offence' (Const. of N. Y., Art., 1, par. 6), and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground, that by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new trial, though it brings him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offence. He, therefore, waives his privilege as to one, and keeps it as to the other. It is upon this principle, that where, by a verdict of guilty on one count or for one offence, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offence of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

But in the subsequent case of People *v.* Palmer, 109 N. Y. 413, 419, the effect of the statute of New York, known as sections 464 and 544 of the Code of Criminal Procedure, was under consideration. Those sections enacted as follows:

"SEC. 464. The granting of a new trial places the parties in the same position as if no trial had been had. . . ."

"SEC. 544. When a new trial is ordered, it shall proceed in all respects as if no trial had been had."

The statute was held valid, and that it did not violate the constitutional provision against subjecting a person to be twice put in jeopardy for the same offence, as the jeopardy was incurred with the consent of and as a privilege granted to the defendant upon his application.

And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offence of which he was accused, but also in regard to the lesser grades of that offence, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in United States *v.* Harding *et al.*, tried in the United States Circuit Court in 1846, 26 Fed. Cas. 131, before Mr. Justice Grier, then a member of this court, and this is the ground substantially upon which the decisions of the other courts are placed.

In Kring *v.* Missouri, 107 U. S. 221, it was stated by Mr. Justice Miller, who delivered the opinion of the court, that it was admitted that by the law of Missouri, as it stood at the time of the homicide, the prisoner having been convicted of murder in the second degree upon an indictment charging him with murder in the first degree, if that conviction was set aside he could not again be tried for murder in the first degree. That law was in force at the date of the homicide for which Kring was sentenced to death, but it was subsequently, and before his retrial, changed so as to deprive him of the benefit to which he would otherwise have been entitled, and this court held that that change was, as to him, *ex post facto* and void. It was also said by the court that there was "no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offences committed after its enactment. The question here is, Does it deprive the defendant of any right of defence which the law gave him when the act was committed so that as to that offence it is *ex post facto?*" This court answered that question in the affirmative.

In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offence of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offence set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offence, contained in the judgment which he has himself procured to be reversed.

It is urged, however, that he has no power to waive such a right, and the case of Hopt *v.* Utah, 110 U. S. 574, is cited as authority for that view. We do not so regard it. This court held in that case that in the Territory of Utah the accused was bound, by provisions of the Utah statute, to be present at all times during the trial, and that it was not within the power of the accused or his counsel to dispense with such statutory requirement. But on an appeal from a judgment of this nature there must be a waiver to some extent on the part of the accused when he appeals from such judgment. When the first trial is entered upon he is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as United States *v.* Ball, 163 U. S. 662, 671 (and nobody now doubts it), that if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offence of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. This holding shows that there can be a waiver of the defence by reason of the action of the accused. As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be deemed to have waived his right), it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offence. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment.

There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not cover, the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable.

A further question is made as to the power of the Supreme Court of the Islands to reverse the judgment appealed from and itself convict the accused on appeal. The Supreme Court, in so doing, acted within its power of jurisdiction. It is a result of the ordinary procedure in the courts of that country, proceeding under the act of Congress already referred to. See statement of the procedure in the case heretofore cited, Kepner *v.* United States, 195 U. S. 100.

The judgment of the Supreme Court of the Philippine Islands is right, and it is *Affirmed.*[1]

SIMMONS *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1891.

[*Reported* 142 *U. S.* 148.]

GRAY, J.[2] The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict, was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: "We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." United States *v.* Perez, 9 Wheat. 579.

A recent decision of the Court of Queen's Bench, made upon a full review of the English authorities, and affirmed in the Exchequer Chamber, is to the same effect. Winsor *v.* The Queen, L. R. 1 Q. B. 289, 390; s. c. 6 B. & S. 143, and 7 B. & S. 490.

There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us, "It is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case." United States *v.* Morris, 1 Curtis C. C. 23, 37.

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[1] HOLMES, J., concurred in the result. FULLER, C. J., and HARLAN, WHITE, and MCKENNA, JJ., dissented. — ED.

[2] Part of the opinion only is given; it states the case. — ED.

Pending the first trial of the present case, there was brought to the notice of the counsel on both sides, and of the court, evidence on oath tending to show that one of the jurors had sworn falsely on his *voir dire* that he had no acquaintance with the defendant; and it was undisputed that a letter, since written and published in the newspapers by the defendant's counsel, commenting upon that evidence, had been read by that juror and by others of the jury. It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury; and the defendant was not thereby twice put in jeopardy, within the meaning of the Fifth Amendment to the Constitution of the United States.

VANDERCOMB'S CASE.

CROWN CASE RESERVED. 1796.

[*Reported* 2 *Leach* (*4th ed.*) 708.]

MR. JUSTICE BULLER, in June Session, 1796, after stating the pleadings, delivered the opinion of the Judges upon this case.[1] This is a demurrer to a special plea of *autrefois acquit* in bar of an indictment for a burglary with intent to commit a felony. The question raised by this demurrer has been argued before all the Judges of England. On that argument it was contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary is charged to have been committed are precisely the same both in the indictment for the burglary and stealing the goods, on which the prisoners were acquitted, and in the indictment for the burglary with intent to steal the goods, which is now depending, the offence charged in both is in contemplation of law the same offence, and that of course the acquittal on the former indictment is a bar to all further proceeding on the latter. To support this proposition two cases in Kelyng's Reports were relied on. It is quite clear that at the time the felony was committed there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts: first, breaking and entering a dwelling-house in the night time, and stealing goods therein; secondly, breaking and entering a dwelling-house in the night time, with intent to commit a felony, although the meditated felony be not in fact committed. The circumstance of breaking and entering the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary to the completion of burglary that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other.[1]

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[1] The opinion only is given; it sufficiently states the case. — ED.

These cases establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of Miss Neville and stealing the goods mentioned; but it appeared that the prisoner broke and entered the house with intent to steal, for in fact no larceny was committed, and therefore they could not be convicted on that indictment; but they have not been tried for burglariously breaking and entering Miss Neville's house with intent to steal, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason the Judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment.

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[1] His Lordship then examined the following authorities: Turner's case, Kelyng, 30; Jones and Bever's case, Kelyng, 52; 2 Hawk. P. C. c. 35, sect. 3; Foster C. L. 361; Rex *v.* Pedley, 1 Leach (4th ed.), 242.

REX *v.* PLANT.

CHESTER ASSIZES. 1836.

[*Reported* 7 *C. & P.* 575.]

MURDER. — The prisoners were tried for the murder of Edward Plant, a child of the female prisoner, by poisoning him. In some of the counts of the indictment both prisoners were charged as joint principals in the actual murder: and in others Louisa Plant was charged with the actual murder, the other prisoner being charged as present, aiding and abetting.

It appeared that the two prisoners co-habited together, and that both went towards a druggist's shop, when he gave something into her hand, and she went into the shop and bought the poison; and, on coming out, gave something to the male prisoner. It further appeared that the female prisoner, about a fortnight after this, took the deceased up stairs and gave him the poison, the male prisoner being in the backyard of the house at the time.

Upon this indictment the female prisoner was convicted, and the male prisoner acquitted, on the ground that he was not present with the other prisoner at the time of the murder, and that he was on this evidence an accessory before the fact.

The prisoners were again indicted; the female prisoner as a principal in the murder, and the male prisoner as an accessory before the fact. To this indictment the prisoner Birchenough pleaded his acquittal on the former indictment: to this plea there was a demurrer.

Cottingham, for the prisoner Birchenough, submitted, that a person who had been tried as a principal in a case of felony, and acquitted, could not be tried as an accessory before the fact to the same felony, and cited 1 Hale P. C. 626, and 2 Hale P. C. 244.

Lord DENMAN, C. J., held that the plea of former acquittal was no bar to the present indictment, and that the prisoner Birchenough must take his trial; but his Lordship reserved the point for the consideration of the Judges.

The jury on this indictment found both the prisoners guilty.

REGINA *v.* CALVI.

CENTRAL CRIMINAL COURT. 1857.

[*Reported* 10 *Cox C. C.* 481*n.*]

ANTONIO DE SALVI was indicted for the wilful murder of Robert Henderson Robertson.

A plea of *autrefois acquit* was pleaded, to which the Crown demurred.

Pollock, C. B. — We are of opinion that this is not a good plea. The prisoner is now indicted for murder, and murder may be committed without any intent to kill. If a man intends to maim and causes death, and it can be made out most distinctly that he did not mean to kill, yet if he does acts and uses means for the purpose of accomplishing that limited object, and they are calculated to produce death and death ensues, by the law of England that is murder, although the man did not mean to kill. On the former occasion the prisoner was charged with wounding with intent to kill. The jury found that he did not intend to kill, and there the intention was of the essence of the crime; that is not so in the present indictment; it is not necessary here to prove an intention to kill, it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death; that is sufficient to sustain the present charge. Try this by the very test presented to us. It is said that it is no bar to the second indictment that a party has been acquitted on the first unless the facts proved on the second indictment might have produced a conviction on the first. But a party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly show he meant to stop short of death, and even took some means to prevent death, but if that illegal act of his produces death, that is murder. Two authorities have been cited with reference to an acquittal or a conviction in a police court: one of them was a case before Mr. Justice Coltman, which turned entirely upon the particular statute (9 Geo. 4, c. 91, s. 28); and as to the case in 5 Law Chronicle, it is evident that that proceeded upon some statute applicable to Scotland, or if it did not, I entirely dissent from the doctrine there laid down. The only suggestion that raised for a moment a doubt in my mind was to the effect that an acquittal of an assault with intent to kill was an acquittal both of the assault and of the intent; but I think that is not so. The acquittal of the whole offence is not an acquittal of every part of it, it is only an acquittal of the whole. Therefore the result of such an acquittal would only be that the acts were not done with intent to kill, and although it was urged that under a recent Act of Parliament it was competent to the jury on the previous occasion to convict of unlawfully wounding, I am not sure if the whole record had been before us that that would have presented any sort of answer. But the record is not before us; all we have is that the jury acquitted the party of the wounding with intent to kill; that is the only thing we have to deal with. It appears to me, therefore, with reference to all the authorities that have been laid before us, that the two offences are not the same, that the plea cannot be supported, and that the prisoner must answer over. I am authorized to state that Mr. Justice Crompton, and Mr. Baron Watson, before whom the case came at the last Sessions, have looked into the matter, and concur in the view now taken.

Martin, B., said he was of the same opinion. After alluding to the peculiar form of the plea, which omitted to aver the identity of the crime now charged with that of which the prisoner had been acquitted, and which omission in his opinion was fatal to the plea, he referred to that portion of the argument founded upon the maxim that no man could be tried twice for one and the same crime. That maxim presented a true criterion by which to test this question. Is the crime here one and the same? Now the offence for which the prisoner has been tried was one of intent, and was therefore complete the moment the stab was given, whereas the offence for which he was now indicted could only be consummated by the death of the party. To the mind of a lawyer this must be deemed conclusive against the plea.

WILLES, J. — In order to support this plea it must be shown that the former acquittal was an acquittal of all that state of facts which might constitute the party a murderer. Now on comparing the two indictments it was clear that the jury had not so acquitted the prisoner; all that was then disposed of was that he did not wound with intent to kill. It could not be assumed that the jury negatived the wounding; therefore, if the wounding, coupled with circumstances not showing an intention to kill, might constitute murder, the prisoner ought now to be tried for that offence, and that this might be the case was clearly shown by the fact that persons inflicting wounds whilst engaged in the commission of burglary or robbery without any intention to kill would be guilty of murder where death ensued. In my opinion, the same matter was not again in discussion. The demurrer must be allowed, and judgment given for the Crown.

The prisoner was then given in charge both upon the indictment and inquisition for the wilful murder of Robert Henderson Robertson. The jury found the prisoner guilty of manslaughter.

REGINA v. MORRIS.

CROWN CASE RESERVED. 1867.

[*Reported* 10 *Cox C. C.* 480.]

CASE reserved for the opinion of this court by Mr. Baron Pigott: —

Thomas Morris was tried before me at the Stafford Spring Assizes, upon an indictment for the manslaughter of Timothy Lymer, by inflicting bodily injuries on him on the 25th June.

It was proved, in evidence, that the prisoner had been summoned before the magistrates at the instance of the said Timothy Lymer, for the assaults which caused the death, and was convicted and sentenced to imprisonment with hard labor. He underwent that punishment.

Timothy Lymer died on the 1st of September from the injuries resulting from the above-mentioned assaults. It was contended under sect. 45 of the 24 & 25 Vict. c. 100, that the conviction for the assaults afforded a defence to the present indictment for manslaughter. See R. *v.* Elrington, 9 Cox Crim. Cas. 86.

There was a substantial question raised by the evidence, whether the manslaughter was the result of injuries inflicted by the prisoner Morris or the prisoner Gibbons, joined in the present indictment, and whether they were acting in concert.

I thought it desirable to let the prisoner Morris have the benefit of either of the defences, and for that purpose to let the questions of fact go to the jury upon the plea of not guilty, and to reserve the question of law under the aforesaid sect. 45, for the opinion of this court.

The prisoner Gibbons was acquitted, and the prisoner Morris was convicted.

If the court should be of opinion that a conviction for the assault at the instance of the injured person, under sect. 45, affords a defence in law to an indictment for manslaughter resulting from that assault, then a plea of not guilty to be entered; otherwise the prisoner Morris to be called up for judgment at the next assizes. G. PIGOTT.

G. Browne, for the prisoner. — The conviction cannot be sustained. The prisoner having been convicted for the assault upon Lymer, and undergone the imprisonment to which he was sentenced for it, was thereby released from all further proceedings in respect thereof, though unfortunately the assault has resulted in the death of Lymer. The 24 & 25 Vict. c. 100, s. 45, enacts that, "If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved shall have obtained such certificate, or having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labor, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." This enactment is similar to one in the repealed statute (9 Geo. 4, c. 31, s. 27), upon which, in Reg. *v.* Walker, 2 Moo. & Rob. 446, it was held that a conviction for the assault before justices was a bar to an indictment for feloniously stabbing in respect of the same matter. And so again in Reg. *v.* Elrington, 9 Cox Crim. Cas. 86, it was held that a certificate of justices of the dismissal of a complaint for an assault might be pleaded in bar to an indictment founded on the same facts, for doing grievous bodily harm, and occasioning actual bodily harm. In Reg. *v.* Stanton, 5 Cox Crim. Cas. 324, Erle, C. J., expressed a similar opinion. He also referred to 1 Hawk. P. C., bk. 1, c. 13, s. 4. [MARTIN, B., referred to the case of Reg. *v.* Salvi, 46 Central Criminal Court Sessions Paper, 884.]

No counsel appeared for the prosecution. *Cur. adv. vult.*

KELLY, C. B. — In this case I have the misfortune to differ with my learned brethren, who are of opinion that the conviction ought to be affirmed. The prisoner was charged before the magistrates with an assault under the 24 & 25 Vict. c. 100, at the instance of the party aggrieved, and now deceased, Timothy Lymer; he was convicted and sentenced to imprisonment with hard labor, and has undergone that sentence. The assault, the unlawful act, with which he was charged, is the same assault and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment. I think, therefore, that the case comes within the precise words of sect. 45 of the 24 & 25 Vict. c. 100, which provides that in such a case "he shall be released from all further or other proceedings, civil or criminal, for the same cause." It is true that the offence is now charged in other language; that which before the magistrates was described as an insult, is now described as manslaughter; but it is one and the same act, and the cause of the prosecution before the magistrates, and the cause of this prosecution, are one and the same cause. The case, therefore, comes within the letter as well as the spirit of the Act of Parliament, and I think that to sustain the conviction would be directly to violate the maxim or principle of the law *nemo debet bis vexari* (here we might say *puniri*) *pro eâdem causâ.* Cases may, indeed, be suggested in which there might be a failure of justice, as where an assault should have been treated lightly by a magistrate, and upon conviction a light sentence passed, and yet from the subsequent death of the party assaulted the offence might amount to murder. But such a case must be rare and exceptional, and I think we ought to presume that the magistrates will in all cases under this or any other Act of Parliament do their duty. And as where the charge is made at the instance of the party aggrieved, it may also be presumed that the whole of the evidence would be fully brought before the magistrates, and, upon conviction, an adequate punishment inflicted accordingly, I do not think that it was the intention of the Legislature, or is consistent with natural justice, that the accident of the subsequent death of the party should subject the accused to a repetition of the trial and punishment. Salvi's case is clearly distinguishable. There the prisoner was indicted for the murder of one Robertson, and pleaded a plea of *autrefois acquit*, the acquittal having been on an indictment for wounding with intent to kill. It was clear that this acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder without an intent to kill the individual murdered, as if he had shot at another man, but unintentionally killed Robertson. The plea, therefore, of *autrefois acquit* was in that case properly overruled. Here, however, the prisoner has been tried, convicted, and punished for the very same offence in all its parts, though under another name, as that for which he is now indicted, and again convicted, and it seems to me that to allow this conviction to stand is to punish a man twice for the same cause, in violation of the beforementioned maxim and of the express language of the Act of Parliament. I think, therefore, that the conviction ought to be quashed.

Martin, B. — I am of opinion that the conviction ought to be sustained. The facts are: Thomas Morris was convicted of an assault on Timothy Lymer, and committed to prison under the 24 & 25 Vict. c. 100, s. 42. He has undergone that punishment, and Timothy Lymer, the man assaulted, has since died in consequence of that assault. Now, this indictment is for the manslaughter of that man; and the question is, whether the suffering of the imprisonment for the assault is an answer to that indictment, and that depends on the meaning of the words "for the same cause" in the statute. I agree with the Lord Chief Baron that the case of Reg. *v.* Salvi is not expressly in point. Salvi had been acquitted of an assault with intent to murder, but convicted of an assault with intent to do grievous bodily harm, and the prosecutor having subsequently died from the assault, he was indicted for murder; and it was held that he might be properly so indicted, for that murder might be committed without any intent to kill, as, for instance, if a man, intending only to maim, caused death, that is murder. I think that decision was correct. I should be sorry to draw a distinction between the words "for the same cause" in the plea of *autrefois acquit*, on which that case was adjudicated, and the same words in the stat. 24 & 25 Vict. c. 100, s. 45. It would be a very serious thing if there were any distinction. The statute gives a release from all further or other proceedings, civil or criminal; and if a different construction were adopted, it would follow that if an action were brought under Lord Campbell's Act in respect of the death of the person assaulted, the conviction and punishment for the mere assault would be a bar to any claim for compensation. I apprehend that that cannot be so; and that the cause on which the justices adjudicated was not the same as that for which the prisoner has been convicted under this indictment. A new offence, in my opinion, arose when the man died. I therefore think that this conviction was right.

Byles, J. — I am of opinion that the prior conviction for the assault under the 24 & 25 Vict. c. 100, s. 45, affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and intention of the common law pleas of *autrefois convict* and *autrefois acquit* show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided. There has, in the present case, been no judicial decision on the same accusation, and the whole question now in dispute could not have been decided, for at the time of the hearing before the magistrates whether the assault would amount to culpable homicide or not depended on the then future contingency whether it would cause death. The case of Reg. *v.* Salvi, if not precisely in point, is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the statute 24 & 25 Vict. c. 100, s. 45, "for the same cause." It is to be observed that that statute does not say for the same act, but "for the same cause."

The word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also, and perhaps with greater propriety, be held to mean "cause for the accusation." The cause for the present indictment comprehends more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted. It is therefore, at least in one sense, not the same cause. But if these observations on the meaning of the word "cause," as used in the statute, should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction. My brother Martin has already illustrated the mischief in civil cases by a reference to Lord Campbell's Act, and in criminal cases the mischiefs might be much greater. A murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

KEATING, J., and SHEE, J., concurred. *Conviction affirmed.*

COMMONWEALTH *v.* ROBY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[*Reported* 12 *Pick.* 496.]

THE defendant was indicted for the murder of Maria Leonard. He pleaded a special plea in bar, in which he alleged that he had previously been convicted, sentenced and committed for a felonious assault upon the said Leonard with intent to murder her, which is the same offense.[1]

SHAW, C. J. We are all of opinion, that the facts constituting the felony and murder charged in the indictment now pending, would not have been competent evidence to warrant a conviction of the offence charged in the indictment in the Municipal Court. That offence was a misdemeanor, to wit, an assault, charged to have been committed with a felonious intent to murder. The offences are distinct in their nature, of a distinct legal character, and in no case could a party on trial for the one be convicted of the other.

The indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offence. If the party assaulted, after a felonious assault, dies within the year and day, the same act, which till the death was an assault and misdemeanor only, though aggravated, is by that event shown to have been a mortal wound. The event, strictly speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be a felonious assault only, had the party not died, is in truth shown by that event to have been a mortal wound, and the crime, which would otherwise have been an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different. . . .

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[1] This statement of facts is substituted for that of the reporter. Part of the opinion is omitted. — ED.

If on an indictment for a felony there cannot be a conviction for a misdemeanor, it seems to be a necessary inference, that on an indictment for a misdemeanor, if the evidence be such as to prove a felony actually committed, the prisoner must be acquitted of the misdemeanor, in order to being indicted for the felony.

This construction is strongly corroborated by considering the effect of a pardon.

It was stated at the bar, in the course of the argument, that inasmuch as an assault is a necessary ingredient in the crime of murder, a pardon of an assault would by necessary consequence operate as a pardon of the murder. The argument is certainly countenanced by a passage in Lord Hale. "If a man give another a mortal stroke, and he dies thereof within a year and a day, but mesne between the stroke and the death there comes a general pardon, whereby all misdemeanors are pardoned, this doth pardon the felony consequentially, because the act, that is the offence, is pardoned, though it be not a felony till the party die;" 1 Hale's P. C. 425; for which Cole's case is cited from Plowden. If such would be the effect of a pardon, it would go far to support the argument in favor of the plea in bar; for it is difficult to perceive any substantial distinction between a former acquittal or former conviction and a pardon. Each effectually secures the party charged from further prosecution. But we are satisfied, from the most careful examination of the question, that such would not be the effect of a pardon. This subject is fully considered in Foster's Crown Law, an authority of the highest character in questions of this nature.

Case of Nicholas, Foster's Cr. L. 64. The prisoner was indicted for petty treason. It was argued in his behalf, that he was entitled to the benefit of the act of general pardon passed at the last session, which took effect after the poison was administered, but before death ensued. It was admitted that wilful murder and petty treason were excepted, but it was insisted that until the death ensued, which was after the act of pardon took effect, the offence could be considered in no other light than a high misdemeanor, and the pardon operated upon it in that light; and consequently the homicide, which was but the consequence of the offence pardoned, was likewise pardoned; and the above passage from Lord Hale was relied upon. To this it was answered by the recorder, that Hale, in this passage, grounds himself singly on the authority of Cole's case; and then the recorder proceeds to show that Cole's case, as reported, does not warrant the rule in the latitude contended for. The case is examined at length. The doubt was, whether the act could operate so as to pardon a felony which was not completed, the death not having happened when the act went into operation. But the effect of the decision of the court was, that the felony having had its commencement, before the pardon took place, and that species of felony, that is, manslaughter, being pardoned by the act, the prisoner was entitled to the benefit of the pardon, though the felony was not completed, by the death of the party, till after the act; and the pardon should operate in favor of the prisoner, in the same manner as it would have done if the felony had been complete, and in no other manner. And in the principal case (Nicholas's) it was therefore held, that the pardon of misdemeanors, though at the time when the act took effect the offence committed was a high misdemeanor only, did not so operate as to pardon the felony, and the prisoner was convicted and executed.

It proceeds manifestly on the ground, that though, at the time the pardon took effect, the only offence with which the prisoner was chargeable was the felonious assault, the death not having ensued, and if so, was pardoned by force of the general act, by a subsequent event not caused by any further agency of the prisoner, the crime was not changed from trespass to felony, but was shown to have been a felony from the time of the mortal wound given, and so not included in the pardon. This renders it manifest that they are distinct offences, in fact and in law; the one pardoned being within the terms of the act, and the other not so, being excepted.

WEMYSS *v.* HOPKINS.

QUEEN'S BENCH. 1875.

[*Reported L. R.* 10 *Q. B.* 378.]

CASE stated by justices of Cardiganshire under 20 & 21 Vict. c. 43.

At the petty sessions at Aberystwith, on the 26th of June, 1872, a complaint was preferred by the superintendent of police against the appellant, under 5 & 6 Wm. 4, c. 50, s. 78, for that the appellant, on the 15th of June, 1872, being the driver of a certain carriage on a certain highway, called Penpache Road, did then and there, by negligence or wilful misbehavior, to wit, by striking a certain horse ridden by the now respondent, cause certain hurt and damage to the now respondent, passing on the highway, by causing severe bruises and concussion of the hip-joint.

The appellant was convicted and fined £2.

At the petty sessions at Aberystwith, on the 7th of August, 1872, a complaint was preferred by the respondent against the appellant, under 24 & 25 Vict. c. 100, s. 42, for that the appellant did, on the 15th of June, 1872, unlawfully assault, strike, and otherwise abuse the respondent.

The appellant was convicted and fined £1.

On the hearing of the last complaint, the justices found as a fact that the appellant did, on the 15th of June, 1872, unlawfully and wilfully strike and push against the horse upon which the respondent was riding, and also against the respondent herself, and caused her to fall from the horse to the ground, whereby she sustained a concussion of the hip-joint.

It was contended on behalf of the appellant that, as he had been convicted of the complaint preferred against him on the 26th of June, he could not be convicted again for what was the same offence

The question for the court was whether the appellant, having been convicted on the 26th of June, 1872, under 3 & 4 Wm. 4, c. 50, upon the complaint of the superintendent of police, could again be convicted on the 7th of August, 1872, under 24 & 25 Vict. c. 100, s. 42, upon the complaint of the respondent.[1]

BLACKBURN, J. I think the fact that the appellant had been convicted by justices under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of autrefois convict, but on the well-established rule at common law that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam;* that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence. The only point raised is whether a defence in the nature of a plea of autrefois convict would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction, it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury. It is necessary in the present case to have it proved, just as in the case of a defence upon the plea of autrefois convict, that on a former occasion the appellant was charged with the same assault, although not in the same words, yet in terms the same, and that he was then convicted and punished. That is the substantial averment in a plea of autrefois convict. Reg. *v.* Elrington, 1 B & S. 688; 31 L. J. (M. C.) 14, and the other cases cited do not apply, for the provisions of § 28 of 9 Geo. 4, c. 31, which have been re-enacted in 24 & 25 Vict. c. 100, s. 45, go further than the common law, and release a person who has been convicted and paid the fine; or who, being acquitted, has obtained a certificate freeing him from further proceedings, civil or criminal, for the same cause. In this case we must rely upon the common law. It seems that the same identical matter was brought before a competent tribunal and the appellant was convicted and punished for it. I do not know whether serving the punishment makes any difference; but he was convicted and sentenced for it, and therefore he cannot be tried again for the same thing before another tribunal; and the justices who convicted the appellant a second time made a mistake, and the conviction must be quashed.

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[1] Argument of counsel is omitted.

Lush, J. I am also of opinion that the second conviction should be quashed upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of two statutes. The appellant was prosecuted for the assault, and convicted under one of the statutes, 3 & 4 Wm. 4, c. 50, s. 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute.

Field, J. I am of the same opinion. The case seems to fall within the principle enunciated in the text-books, particularly in Paley on Convictions, 5th ed. p. 145, and Broom, Legal Maxims, 3d ed. p. 312; and I think the circumstance that this was a conviction under a jurisdiction created by statute does not make any difference in principle. A person cannot be twice punished for the same cause.

Judgment for the appellant.[1]

STATE *v.* INGLES.

Superior Court of North Carolina. 1797.

[*Reported* 2 *Haywood*, 4.]

Indictment for a riot with others, and for beating and imprisoning Edward D. Barry. The defendant pleaded that he had been heretofore indicted in the County Court of Edgcombe for an assault and battery on the said Barry, and thereon had been convicted and fined, which indictment and conviction had been grounded on the same facts that this indictment was preferred for.

Per Curiam. After argument by *Baker* for the State, and *White* for the defendant, the truth of this plea is admitted by the demurrer. The State cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offence compounded of them all; as, for instance, just [first?] to indict for an assault, then for a battery, then for imprisonment, then for a riot, then for a mayhem, &c. But upon an indictment for any of these offences the court will enquire into the concomitant facts, and receive information thereof, by way of aggravating the fine or punishment, and will proportion the same to the nature of the offence as enhanced by all these circumstances; and no indictment will afterwards lie for any of these separate facts done at the same time. This plea is a good one, and must be allowed.

The plea was allowed and the defendant discharged.

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[1] See Hankins *v.* People, 106 Ill. 628; cf. State *v.* Thornton, 37 Mo. 360.

STATE *v.* DAMON.

SUPREME COURT OF JUDICATURE OF VERMONT. 1803.

[*Reported* 2 *Tyler*, 387.]

CURIA.[1] It appears that the defendant wounded two persons, in the same affray, at the same instant of time, and with the same stroke. On a regular complaint made, he has been convicted before a court of competent jurisdiction, for assaulting, beating, and wounding Frederick Miller, one of those persons. He stands here indicted for assaulting, beating, and wounding Elias Doty, the other of those persons; and the defendant pleads in bar the former conviction, which he alleges to have been for the same offence. The only question is whether the defendant has been already legally convicted of the offence charged in the indictment. Of this there can be no doubt; for it is apparent on the record that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice *Randall*, were at the same place and in the same affray, and the wounds made by the same instrument and by the same stroke.

This is not a question between either of the persons injured by the assault and battery and their assailant; redress has been, or may be obtained by them by private actions; but it is a question between the government and its subject, and the court are clearly of opinion that the indictment cannot be sustained. The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot therefore be again held to answer in this court for the same offence.[2]

Prisoner discharged.

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[1] The opinion only is given, it sufficiently states the case. — ED.

[2] The question here is: Can a person, during the same evening, at a ball, commit a separate assault and battery upon each of two individuals? The evidence tends to show that, as matter of fact simply, it was done in this case. But the appellant claims that how many soever of assaults and batteries he may have committed during the period of excitement at the ball, they all amounted in law to but one offence, and that therefore the first fine inflicted for that offence, viz., that by Justice Brown, for the assault and battery on Frank Kelly, was a bar to all subsequent prosecutions for assault and battery committed during the period of excitement before mentioned. We cannot concur in this view. We think appellant might be prosecuted for each separate assault and battery. — PERKINS, J., in Greenwood *v.* State, 64 Ind. 250.

STATE *v.* LEWIS.

SUPREME COURT OF NORTH CAROLINA. 1822.

[*Reported* 2 *Hawks*, 98.]

AT September term, 1821, of Pitt Superior Court, two bills of indictment against the prisoner were found by the grand jury; the one for burglary and larceny, the other for a robbery. The larceny in the one bill, and the robbery in the other, were for the same goods and chattels, and there was but one taking. At the same term the prisoner was found guilty of the larceny, and not guilty of the burglary. On this conviction the attorney-general did not pray any judgment, nor was any pronounced; and, at the time of the prisoner's arraignment, no motion was made by his counsel that the prosecuting officer should elect on which indictment he would try the prisoner. At March term, 1822, the prisoner was brought to the bar, and the attorney-general directed a *nol. pros.* to be entered on the indictment which had been tried at the preceding term, but the court (NORWOOD, J., presiding) refused to permit the *nol. pros.* The attorney-general then moved to arraign the prisoner on the indictment for robbery; this also was refused by the court until the first indictment should be disposed of, and on the refusal of the attorney-general to pray judgment on the first indictment, the court quashed the indictment for robbery. On motion of prisoner's counsel, his clergy was allowed him on the conviction for larceny, and, on the further refusal of the attorney-general to pray judgment, the prisoner was ordered to be discharged; whereupon, in behalf of the State, the prosecuting officer appealed to this court.

HALL, J. It is admitted in this case that both indictments are for the same felonious taking of the same goods. The defendant is found guilty of a grand larceny on that indictment which charges a burglary and stealing.

The other indictment is for a robbery; a robbery is a larceny, but of a more aggravated kind. The first is a simple larceny. The other is a compound or mixed larceny, because it includes in it the aggravation of a felonious taking from the person.

Now, suppose the defendant should be tried and found guilty on the second indictment? It must certainly follow that he had been tried twice for the feloniously taking of the same goods. It is true, if the first conviction is a bar to a trial on the second indictment, the prisoner would go untried as to that which constitutes the difference between simple larceny and mixed and compound larceny, viz., a taking from the person. In such case he would be convicted of a felonious taking, but not of a felonious taking from the person. Whereas, should he be tried and convicted on both indictments, it might be said he had been convicted twice of a felonious taking, and once of a felonious taking from the person, which I think would be at points with the principle "that no one should be twice put in peril for the same crime." This principle has such deep root in the criminal law, and is cherished by so many judicial decisions, that it is not deemed necessary to refer to any of them.

I therefore think the conviction on the first indictment for burglary and larceny a good plea to a trial on the second indictment for robbery. I also think that the record of these proceedings, and the admissions of the attorney-general were sufficient to authorize the judge below to discharge the prisoner. And in this opinion the rest of the court concurred.

PEOPLE *v.* McGOWAN.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1837.

[*Reported* 17 *Wend.* 386.]

ERROR from the Albany Oyer and Terminer. The defendant was indicted at the Albany general sessions in June, 1837, for grand larceny, in stealing one watch of the value of $110, one watch of the value of $65, one watch of the value of $45, one gold watch of the value of $110, one gold watch of the value of $65, and one silver watch of the value of $45, the property of one Alexander M'Harg. The prisoner pleaded that at the Albany general sessions held in March, 1837, he was indicted for robbery, being charged with entering a shop, putting one James De Forrest in bodily fear, and violently taking and feloniously stealing one gold watch of the value of $110, one silver watch of the value of $65, and one other silver watch of the value of $45, the property of De Forrest; and also with entering the shop, putting De Forrest in bodily fear, and violently taking and feloniously stealing one gold watch of the value of $110, one silver watch of the value of $65, and one other silver watch of the value of $45, the property of Alexander M'Harg; that he was arraigned and pleaded not guilty to the said indictment; that the issue thus joined was tried at the Albany Oyer and Terminer, in April, 1837, and that he was duly acquitted by the verdict of a jury. The prisoner then averred his identity and the identity of the offences charged in the two indictments, and prayed to be dismissed. The district attorney put in a replication, denying the identity of the offences, and upon the issue thus joined the prisoner was tried. The record of acquittal set forth in the plea was produced, and the counsel for the prisoner insisted that the prisoner was entitled to a verdict in his favor; but the presiding judge charged the jury that to entitle him to a verdict it was necessary that the evidence to support the last indictment would have been sufficient to support the first indictment, and that as the proof to support a charge of larceny was not sufficient to sustain a charge of robbery, the offences charged in the two indictments were not the same, and consequently the acquittal on the first indictment was no bar to a conviction on the second, and that it was their duty to find the prisoner guilty. The jury found accordingly. The prisoner having excepted to the charge of the judge, sued out a writ of error.

By the Court, COWEN, J. The first indictment, though for a robbery, involved the question of simple larceny, of which the prisoner, under that indictment, might have been convicted. So far therefore as the nature of the offence is concerned, the plea was valid; the prisoner had, within the issue, been tried and acquitted of the larceny. The rule laid down by the Court of Sessions applied; for the same proof would sustain either indictment to the extent necessary for the purposes of the plea.

In this respect no proof was necessary on the part of the prisoner. The replication admitted the former indictment and acquittal, and took issue only upon the identity of the offences. In such case it is well settled that where the former indictment might have been sustained by showing the offence charged in the second, a *prima facie* case is made out for the prisoner. It then lies with the people to show, by evidence *aliunde*, that the offences are substantially different in point of fact, or to give some other answer.

In the case before us, it is said for the people that the two offences differ in respect to the identity of property; the former indictment speaking of six gold and silver watches, three of which belonged to De Forrest, and three to M'Harg; whereas, now it is charged that all the six, viz., three watches, and three gold and silver watches, belonged to the latter; and that the prisoner admits by his plea that he stole these six which belong to M'Harg. We cannot but see, however, that the difference is mere matter of form; and that proof might have been received at the last trial of the same facts which would have been sufficient to sustain the indictment upon the first. The admission in the plea is not of every formal allegation which the counsel for the people may choose to insert in a second indictment. It admits the substance, which is grand larceny of some watch belonging to M'Harg, and that is just such an offence as might have been shown upon the first trial. There is no such substantial conflict in the indictments as to preclude the common averment that the offences are one and the same, and not other or different.

The replication thus admitting a former trial and acquittal upon an indictment sustainable by the same proof which would be receivable under the second, the prisoner was, as his counsel insisted, *prima facie* entitled to a verdict. It lay with the counsel for the people to prove their case, and then to show by further testimony that it was not the case before presented, nor which might have been insisted upon at the trial for the robbery.

At all events, the prisoner was entitled to go farther on his part, and show that, in truth, the former trial was concerning a robbery, or a larceny of M'Harg's watch. This would have exhibited an offence covered by the last indictment, and precluded all farther inquiry concerning it, until the people should reply by contradictory proof, or by setting up, on new proof, a really distinct and untried offence. But the ruling of the court below cut the prisoner off from all farther proof. The whole case was thrown upon a substantial difference between the offences involved in the two indictments, appearing on their face.

The great object in respect to that class of pleas in bar to which this belongs is to see, in the first place, whether the former and the present declaration or indictment are of sufficient capacity to let in the same cause of action or offence under each. If so, the former trial is, *prima facie*, always a bar. The parties should, however, be allowed free scope for inquiry as to what was, in truth, the substantial matter before litigated. If that were the same, and the case was tried upon its merits, the decision becomes conclusive, especially in a criminal proceeding.

The verdict at the general sessions must be set aside, and a new trial had in that court.

COMMONWEALTH *v.* CLAIR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 7 *Allen*, 525.]

INDICTMENT for embezzling sixteen Melton cloth overcoats, the property of David M. Hodgdon.

At the trial in the Superior Court, before AMES, J., the defendant pleaded in bar a previous acquittal upon the same charge; and it was admitted, on the part of the Commonwealth, that the defendant had been duly tried and acquitted on an indictment charging him with embezzling a quantity of Melton cloth, lasting, velvet, flannel, wadding, and other materials used in making overcoats, the property of said Hodgdon, which had been delivered to the defendant to be made into overcoats; and that the present indictment was for the same crime intended to be covered by the first indictment. The principal facts which appeared in both cases were, that Hodgdon delivered the materials to the defendant as aforesaid, and that several overcoats were made up and returned, but the work proved unsatisfactory, and they were redelivered for completion to the defendant, who subsequently did the acts relied upon as proof of the embezzlement.

The judge overruled the plea in bar, and the defendant alleged exceptions.

BIGELOW, C. J. The obvious and decisive answer to the defendant's plea in bar of *autrefois acquit* is, that the first indictment charges a different offence from that set out in the indictment on which the defendant is now held to answer. The principle of law is well settled that in order to support a plea of *autrefois acquit* the offences charged in the two indictments must be identical. The test of this identity is to ascertain whether the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence on the trial of the first; but whether the facts are so combined and charged in the two indictments as to constitute the same offence. It is not sufficient to say, in support of a plea of *autrefois acquit*, that the transaction or facts on which the two indictments are based are the same. It is necessary to go further, and to ascertain and determine whether they are so alleged in the two indictments as to constitute not only the same offence in degree or kind, but also that proof of the same facts offered to sustain the second indictment would have well supported the first. The King *v.* Vandercomb, 2 Leach (4th ed.), 708; Commonwealth *v.* Roby, 12 Pick. 496, 500; Commonwealth *v.* Wade, 17 Pick. 400. The last case affords an apt illustration of the practical application of the rule. The defendant was indicted for burning a dwelling-house by setting fire to the barn of A. and B. The evidence showed that it was the barn of A. and C. This variance in the description of the offence was held to be fatal, and the defendant was acquitted. He was subsequently indicted for burning the same house by setting fire to the barn of A. and C. On a plea of *autrefois acquit* it was held that the previous acquittal on the first indictment was no bar. The facts offered in support of the two indictments were the same, but different offences were charged in them. The averment of property in the barn was material, and this fact being alleged differently in the two indictments, they were not for the same offence either in form or substance. So in the case at bar. The defendant was first indicted for embezzling cloth, velvet, flannel, and other materials of which overcoats were made. This indictment would not have been supported if it appeared that, at the time when the alleged embezzlement was committed by the defendant, these articles no longer existed separately, but had been used and converted into garments properly called and known as overcoats. There would have been in such case a material variance in the description of the articles embezzled; the evidence would not have corresponded with the allegation in the indictment of embezzling cloth and other materials, and the defendant would have been rightly acquitted on that ground. It is common learning that in indictments for larceny, embezzlement, and kindred offences, the description of the property which forms the subject of the offence must be proved as laid. A person indicted for stealing shoes cannot be convicted by proof that he had stolen boots; nor is an indictment for stealing a sheep, which by legal implication avers that the animal was alive when stolen, supported by evidence that it was in fact dead when feloniously taken. If an article has obtained in common parlance a particular name, it is erroneous to describe it by the name of the material of which it is composed. Archb. Crim. Pl. (5th Am. ed.)

48; Roscoe's Crim. Ev. (5th ed.) 203; Rex *v.* Edwards, Russ. & Ry. 497; Rex *v.* Halloway, 1 C. & P. 128; Regina *v.* Mansfield, Car. & M. 140.

In the second indictment the defendant is charged with embezzling overcoats. This is a different offence from that charged in the first indictment. Nor would the evidence which would be sufficient to support it have warranted a conviction on the charge of embezzling the materials of which the coats were made. He has therefore been acquitted of a different offence from that now charged against him. Such acquittal is no bar to the present indictment.

Exceptions overruled.

APPENDIX

THE following definitions of the principal crimes are taken chiefly from Blackstone's Commentaries, and from the codes and statutes of California, Indiana, New York, and Ohio. It is believed that, so far as the common-law definitions of these crimes have been changed in any jurisdiction by statute, the changes will not materially vary from those here given.

Treason.

Const. U. S., art. 3, sec. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

For treason in England, see 4 Bl. Com. 74.

N. Y. Penal Code, secs. 37–40. Treason against the people of the state consists in

1. Levying war against the people of the state, within this state; or
2. A combination of two or more persons by force to usurp the government of the state, or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or
3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed in the constitution of the United States, or giving to such enemies aid and comfort within the state or elsewhere.

Treason is punishable by death.

To constitute levying war against the people of this state, an actual act of war must be committed. To conspire to levy war is not enough.

Where persons rise in insurrection with intent to prevent in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

Cal. Pen. Code, secs. 37–38. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to this state. The punishment of treason shall be death.

Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or partaking in the crime. It is punishable by imprisonment in the state prison for a term not exceeding five years.

(This is the common form of definition. Ohio inserts the word "knowingly.")

Escape, Rescue, etc.

4 Bl. Com. 129–131. An escape of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold is also an offence against public justice, and the party himself is punishable by fine or imprisonment; but the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner.

Breach of prison by the offender himself, when committed for any cause, was felony at the common law; or even conspiring to break it: but this severity is mitigated by the statute 1 Edw. II., which enacts that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence.

Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment.

Barretry.

4 Bl. Com. 134. Common barretry is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherways.

N. Y. Pen. Code, sec. 132. Common barratry is the practice of exciting groundless judicial proceedings.

Maintenance.

4 Bl. Com. 134. Maintenance is . . . an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it. . . . A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity.

Cal. Pen. Code, sec. 161. Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Champerty.

4 Bl. Com. 135. Champerty, *campi-partitio*, is . . . a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law; whereupon the champerter is to carry on the party's suit at his own expense.

(These crimes are obsolete in most states.)

Embracery.

4 Bl. Com. 140. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.

Extortion.

4 Bl. Com. 141. Extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.

Perjury.

4 Bl. Com. 137. Perjury is . . . committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely and falsely in a matter material to the issue or point in question.

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal.

Cal. Pen. Code, 118. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

Ind. Rev. Stat., sec. 2006. Whoever, having taken a lawful oath or affirmation in any matter in which, by law, an oath or affirmation may be required, shall, upon such oath or affirmation, swear or affirm willfully, corruptly, and falsely touching a matter material to the point in question, shall be deemed guilty of perjury. . . .

Oh. Rev. Stat., sec. 6897. Whoever, either verbally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood, as to any material matter, in a proceeding before any court, tribunal or officer created by law, or in any matter in relation to which an oath is authorized by law, is guilty of perjury, and shall be imprisoned in the penitentiary not more than ten nor less than three years.

N. Y. Pen. Code, secs. 96–99, 101. A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration, deposition, certificate, affidavit, or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, willfully and knowingly testifies, declares, deposes or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit, or certificate, any material matter to be true which he knows to be false, is guilty of perjury.

It is no defense in a prosecution for perjury that an oath was administered or taken in an irregular manner. . . .

It is no defense to a prosecution for perjury that the defendant was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he actually was permitted to give such testimony or make such deposition or certificate.

It is no defense to a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in and for which it was made. It is sufficient that it was material, and might have affected such proceeding.

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

Affray.

4 Bl. Com. 145. Affrays (from affraier, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no affray but an assault. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace.

Riot, etc.

4 Bl. Com. 146. Riots, routs, and unlawful assemblies, must have three persons at least to constitute them. An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it. A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it. A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.

Forcible Entry.

4 Bl. Com. 148. Forcible entry or detainer is committed by violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law. (So Ind.)

Cal. Pen. Code, sec. 418. Every person using, or procuring, encouraging, or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor. (So New York.)

Murder.

See *ante*, pp. 461, 471.

Manslaughter.

See *ante*, p. 473.

See a division of this crime into degrees in New York, Pen. Code, secs. 189 to 201.

Mayhem.

See *ante*, p. 419.

Rape.

See *ante*, pp. 419, 455.

Robbery.

See *ante*, pp. 419, 699.

Assault and Battery.

See *ante*, pp. 420–434.

Arson.

See *ante*, p. 797.

For degrees of arson, see N. Y. Pen. Code, secs. 486–488.

Burglary.

See *ante*, p. 780.

For degrees of burglary, see N. Y. Pen. Code, secs. 496–498.

Larceny and Kindred Crimes.

See *ante*, pp. 488 ff., 706, 718, 758.

Cal. Pen. Code, secs. 484, 503, 532. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.

Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable, . . .

N. Y. Pen. Code, Sec. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either,

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody or control, any money, property, evidence of debt or

contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

Steals such property, and is guilty of larceny.

Mass. R. L. ch. 208, Sect. 26. Whoever steals, or, with intent to defraud, obtains by a false pretence, or whoever unlawfully and, with intent to steal or embezzle, converts or secretes with intent to convert, the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny.

Malicious Mischief.

4 Bl. Com. 244. Malicious mischief, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi* or with an intent of gaining by another's loss; which is some, though a weak excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals.

Forgery.

4 Bl. Com. 247. Forgery or the *crimen falsi* is . . . the fraudulent making or alteration of a writing to the prejudice of another man's right.

Oh. Rev. Stat. sec. 7091. Whoever falsely makes, alters, forges, counterfeits, prints or photographs any (here are enumerated such instruments as may be forged) with intent to defraud; or utters or publishes as true and genuine any such false, altered, forged, counterfeited, falsely printed or photographed matter, knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to defraud, is guilty of forgery.

(This is substantially the form of statute in most states. For degrees of forgery, see N. Y. Pen. Code, secs. 509–519.)

Piracy.

4 Bl. Com. 72. The offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there.

2 Bish. Crim. Law, sec. 1058. Piracy is any forcible depredation on the high seas perpetrated in general hostility to mankind for the gain or other private ends of the doers.

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